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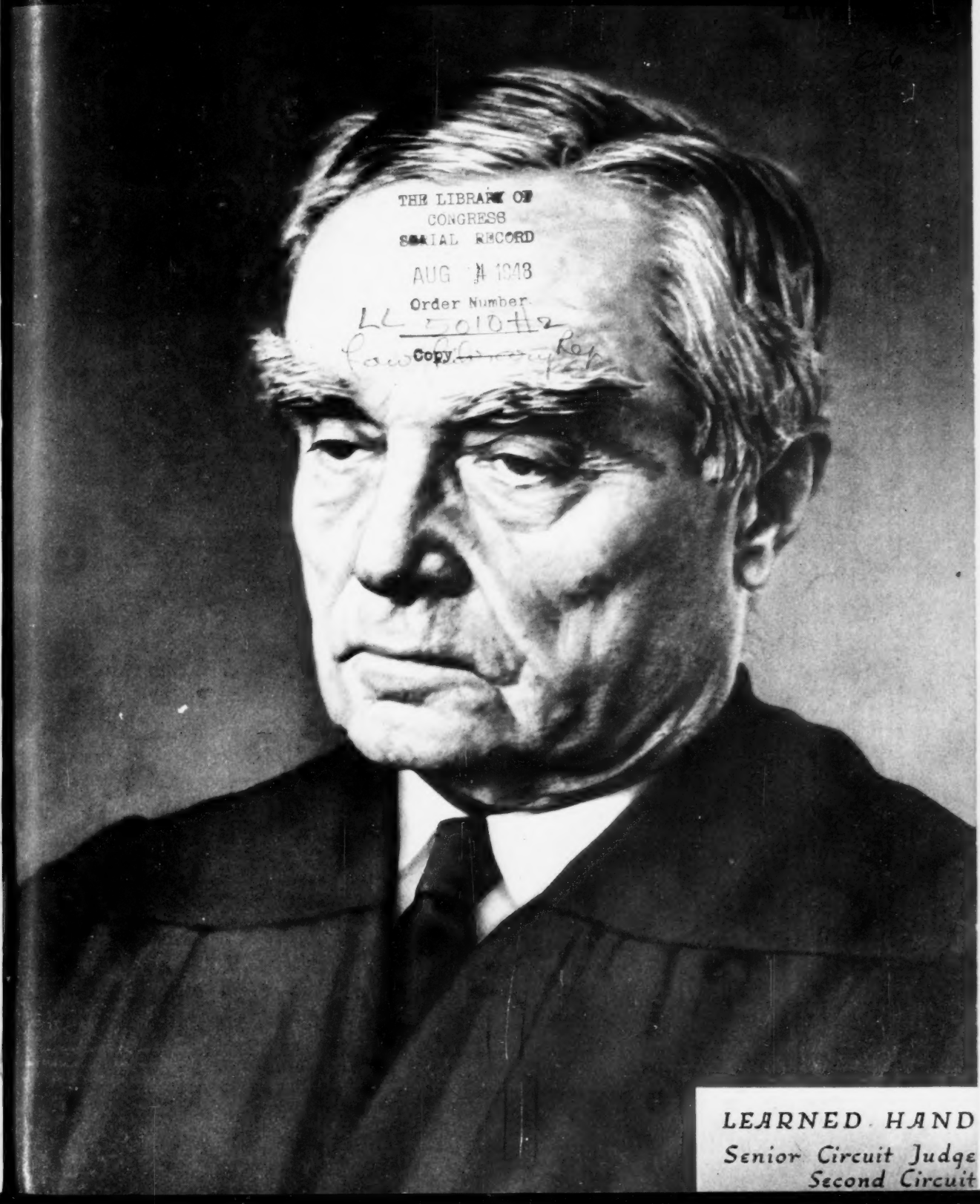

LEARNED HAND
Senior Circuit Judge
Second Circuit

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In This Issue

Fourth Circuit Conference Discusses Federal Tort Claims Act **1**

Again a Judicial Conference in one of the Circuits has produced material of much usefulness and interest to many lawyers in their work for clients. This time it is the Conference for the Fourth Circuit. United States District Judge Ben Moore, of West Virginia, gave a practical paper to open a panel discussion of the new Federal Tort Claims Act (see our March issue, pages 221–229) under which more than 400 cases have already been filed. Five of the leading lawyers of the Circuit discussed as many specific phases of the Act. Our synopses produce an article which no practicing lawyer should miss.

Substantial Victory Won as to Hearing Examiners **2**

Our Association's insistence that the letter and intent of its Administrative Procedure Act shall not be destroyed or weakened at the start by a disregard of its provisions as to the selection, status, tenure and qualifications of the Hearing Examiners seems finally to have prevailed on August 8 in the action of the U. S. Civil Service Commission. Thus another substantial service has been rendered by our Association to the public and the profession in the interests of impartial and competent fact-finding and agency decisions according to law. Details are given in this issue; the significance of the outcome is also the subject of an editorial.

R. C. Stovall Discusses "The Old Issue" **3**

As President of the Mississippi State Bar, R. C. Stovall took from Rudyard Kipling's famed poem the text for a stirring plea for the maintenance of law and individual rights against the rise of arbitrary powers that lead to tyranny. In his discussion of the human rights recognized, and supposed to be protected by our Bill of Rights, he expressed outspoken views as to the perils which appear to him to be inherent in the recent decision of the Supreme Court in *Harris* v. *U. S.*, 67 Ct. 1098, which was reviewed in 33 A.B.A.J. 608; June, 1947.

Senior Circuit Judge Learned Hand of the Second **4**

An outstanding American judge, admired and beloved in many lands for his many-sided scholarship, his lofty ideals of the judicial function, his broad humanitarianism and his fidelity to the indispensable bases of liberty and the rights of persons under the law, is the subject of our cover portrait and sketch this month. An editorial comments on the series we have been publishing.

Improving the Methods of International Legislation **6**

The essay which won for William Tucker Dean, Jr., the Erskine M. Ross prize of $2500 for the best discussion submitted on the selected subject (see our July issue, page 665) will be of interest to many readers who are concerned for the future of international and world law.

Notable Sketch of Chief Justice Logan E. Bleckley of Georgia **7**

S. Price Gilbert, himself a distinguished Georgia lawyer, a retired member of the Supreme Court of that State, has written for us from his rich recollections an inspiring sketch of one of the most illustrious and beloved of Southern jurists of a preceding generation. The author has put into his portrayal a great deal of reverence for the judicial function and has given also his concept of the spirit which should actuate all judges and lawyers. This sketch is highly recommended reading for lawyers young and old.

Associate Editor of *The Atlantic Monthly* Answers Harold R. McKinnon **8**

Richard E. Danielson, brilliant Associate Editor of *The Atlantic Monthly*, has written for us a vigorous reply to Harold R. McKinnon's article in our June issue (pages 544-547), in which Mr. McKinnon, among other things, challenged statements made by Mr. Danielson as to individual rights. Our gifted contributor champions and stoutly defends the views which were attributed to him.

Harold R. McKinnon Sums Up for Individual Rights Against Government **8**

Commenting on Richard E. Danielson's rejoinder, Mr. McKinnon summarizes his argument for basic human rights which are not bestowed by government and which need to be kept beyond the power of the majority or all of the people to take away or impair, unless totalitarian concepts are to become rife. With the Danielson and McKinnon articles there should be read also, in this issue, Ben W. Palmer's thoughtful review of Professor Rommen's *The Natural Law*, which makes the point that criticism of some concepts of "natural" rights deserves commendation in a free society. The animated discussion contained in these three articles should clarify the issues in this perennial and vital controversy.

The Lord Chancellor Will Address Our Association **9**

Viscount Jowitt of Stevenage, Lord Chancellor under Britain's Labor Party Government, one of the most colorful and engaging of British lawyers and Radical leaders, will be one of our Association's honor guests at this month's Annual Meeting in Cleveland, where he will address the dinner on Thursday evening, September 25. A sketch of his career in law and politics will interest our readers.

American Judges and Lawyers in Tribunals Abroad **11**

We give a list of the members of the six Tribunals which are sitting at Nuremberg. For these important but temporary judicial posts, highly qualified and experienced judges and lawyers have been chosen from the majority as well as minority political party, suggesting that nominations for the District and Circuit Courts of the United States need not be limited virtually to members of the minority party. Many of those serving in the Tribunals are members of our Association and are or have been judges of high Courts in their States.

An Air Carrier's Liability for Death and Injuries **13**

A well-annotated article in a new and developing field of law is contributed by Gibson B. Witherspoon, of the Mississippi Bar, member of the National Conference of Commissioners on Uniform State Laws. He brings together the decisional law and analyses the cases in a manner which will be useful to lawyers who may have cases in that field.

Pennsylvania Lawyers Debate Restrictions on Bar Admissions **14**

In Pennsylvania the admission of a lawyer to practice before the Supreme Court of the State does not enable him to open an office, take a job, or practice law, in whatever county and locality he chooses. He has to be admitted also in the county; and there are local restrictions in some counties as to prior residence, the number of lawyers to be admitted in any one year, etc. A spirited debate as to removing or releasing local restrictions took place at the June 30-July 3 meeting of the Pennsylvania Bar Association. The vote was in the negative. Lawyers in other States will find the report and discussion interesting.

The Tax Men Speak as to Who Shall Tax What **15**

A comprehensive summary of an outstanding report on the coordination of taxes between federal, State and local governments, is in this issue. The recommendations are the product of long study by a representative and specially qualified Joint Committee representing three expert organizations, of which the Section of Taxation of our Association is one. Commissioner Henry F. Long, of the Massachusetts Bar and our Association, as Chairman of the Joint Committee and of each of the three constituent committees, has rendered a public service in bringing to fruition this notable study and report. The dissents are as significant as the recommendations.

Peace Brings Resumption of Our *London Letter* **17**

A happy event of the return of "peace when there is no peace" is the resumption of our *London Letter*, written by the distinguished Librarian and Keeper of the Records of the Middle Temple. It shows sharp contrasts and striking parallels as to problems with which members of the profession in the two countries are struggling.

Rulings in Courts, Departments and Agencies **21**

Do many of our readers miss the mine of worthwhile material in this department because it is not featured, is in "the back of the book," and is there every month? It can give no omnibus coverage, but many lawyers read and heed it as they do their advance sheets and "services." It assays high; it yields a lot of "pay dirt" for the day's work.

Law School Forums to Discuss Public Questions **22**

The Forum started last year by students in the Harvard Law School has become already a New England institution, because it comes to grips with vital issues on which law students should keep informed and alert, despite their preoccupation with their studies. Because the Harvard experience may be helpful to other law schools and to communities, we publish a pragmatic account of what has been done in Cambridge.

Federal Tort Claims Act:

Useful Discussion at Fourth Circuit Conference

■ Desirous of giving practical assistance to practicing lawyers and law teachers, as well as to its own members, the 1947 Judicial Conference for the Fourth Circuit, held at Asheville, North Carolina, conducted a notable panel discussion as to the interpretation, construction and application of the new Federal Tort Claims Act, which was preliminarily explored in articles by Professor Edwin Borchard and Harold G. Aron in our March issue (pages 221-229). In the Fourth Circuit Conference, Judge Ben Moore, of the United States District Court for the Southern District of West Virginia, gave a scholarly and pragmatic paper on the new Act, after which five of the leading lawyers of the Circuit gave concise discussions of as many principal phases of the Act. These were:

W. R. C. Cocke, of Norfolk, Virginia;
Robert C. Spilman, of Charleston, West Virginia;
Roszel S. Thomsen, of Baltimore, Maryland;
Bryce C. Holt, of Greensboro, North Carolina; and
Dean Samuel L. Prince, of the University of South Carolina Law School.

Desirous of making the material developed in this notable symposium available to lawyers and judges throughout the country, we publish nearly all of Judge Moore's paper and substantial synopses of the five presentations which followed it. We wish that we could have published all of this useful material in full, but the limitations on our space forbade. What we do publish exceeds our usual limits on the length of an article, but this is really six articles under one heading, and all of them worthy of careful study.

Judge John J. Parker is the Senior Circuit Judge of the Fourth Circuit. The panel discussion on June 14 was presided over by Circuit Judge Armistead M. Dobie of the Fourth Circuit. Other proceedings of this Conference are reported elsewhere in this issue. Judge Moore's paper follows:

■ Nearly a year ago, Congress passed an Act making the United States liable, with some restrictions and exceptions, for the torts of its employees while acting within the scope of their office or employment. As is the case with every new National law, it will be the responsibility of the various District Courts in the first instance to interpret the Act and apply it to individual cases. We never know, of course, whether our decisions will have any weight with our brethren next above us in the judicial hierarchy; but it is a comforting thought that the same uncertainty prevails on their part with respect to that other tribunal from whose decisions there is no appeal except in the rare cases wherein it reverses itself.

We are informed by the Administrative Office that already, at the end of the third quarter of the current fiscal year, over four hundred cases have been filed under the new Act and that the volume is rapidly increasing.[1]

Jurisdiction is given to District Courts to hear and determine, without a jury, any money claim against the United States, for property damage or for personal injury or death, caused by the negligent or wrongful act or omission of a Government employee while acting within the scope of his office or employment. The circumstances must be such that a private individual would be liable if he, rather than the Government, were the defendant; and the case is to be governed, in its substantive aspects, by the law of the place where the act or omission occurs. The government is not to be held liable for punitive damages, for interest prior to judgment, or for the payment of attorneys' fees. Judgments of District Courts may be appealed, of course, to the Circuit Courts of Appeals or alternatively, if the appellee consents, to the Court of Claims.

Many kinds of claims are exempted from the scope of the Act. The exemptions of most general interest are: (1) Claims based on an act or

1. Quarterly Report of The Director of The Administrative Office of the United States Courts; May 15, 1947.

omission of an employee, exercising due care, in the execution of a statute or regulation, whether the statute or regulation be valid or not; (2) claims based on exercising or failing to exercise discretionary functions; (3) claims based on negligent transmission of mail; (4) claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. These exemptions, together with others, are evidently designed to protect the government in the exercise, through its employees, of necessary governmental functions, and to avoid harassment by persons who may think their rights have been invaded thereby. Curiously enough, there is a final exemption of "any claim arising from the activities of the Tennessee Valley Authority." Why this particular agency of government is singled out for immunity is a mystery, the depths of which I have not been able to fathom.

Government agencies are given power to settle claims up to $1,000; but if claims are disallowed, in whole or in part, they may be sued on in the District Court. [Judge Moore next referred to and discussed the fact that the Act marks the removal from our National judicial system of the long-imbedded legal fiction or tradition that "the King can do no wrong", whence arose the theory or doctrine of Government immunity from suit. "Our own Courts," he said, "early adopted the English doctrine of government immunity, but the rationale of the rule is not always apparent in their decisions."[2]]

The desirability of State and federal immunity from tort actions has long been a subject of controversy.[3] Should the faultless individual who has suffered damage from governmental invasion of his rights be required to bear the loss; or should the community assume responsibility for the tortious acts of its agents? Congress has now concluded that justice requires the latter course. As a result, to quote from Professor Borchard; "The community will gain by promoting respect among its members for its fairness and justice and, instead of relying upon antiquated formulas to escape liability, it will meet the exigencies of modern organized life by discharging what the rest of the world recognizes as just obligations."[4]

History of Encroachment Upon Government Immunity in the United States

In the United States, encroachment upon the domain of Government immunity has been slow and gradual.[5] Congress has shown reluctance to discard the sacred doctrine, and has made concessions grudgingly. In 1855, the Court of Claims was established, with jurisdiction over claims against the United States founded upon any law of Congress or upon any contract, express or implied.[6] The Courts were quick to exclude any possible construction that would afford individuals the right to sue in the Court of Claims for actions *ex delicto*.[7] The Tucker Act of 1887 established in the United States District Courts, jurisdiction concurrent with the Court of Claims, of all claims not exceeding $10,000.[8] Jurisdiction under the Tucker Act was again confined to contract actions, and the settled distinction between tort and contract could not "be evaded by framing the claim as upon an implied contract."[9]

Subsequent to the enactment of the Tucker Act, Congress provided for suits by patent owners for patent infringement by the United States,[10] and for a libel *in personam* against the United States where a vessel is employed as a merchant ship or as a tugboat, and where a proceeding in admiralty could have been maintained if the vessel had been privately owned or operated.[11]

The Private Claims Bill System

Until the passage of the present Act on August 2, 1946, the only redress for the individual whose rights had suffered a tortious invasion was through the private claim bill system. The magnitude of private claim bills introduced in Congress has been prodigious. The Seventy-fourth and Seventy-fifth Congresses each considered more than 2,300 private claim bills asking for a total of over $100,000,000.[12] Approximately 2,000 private claim bills were introduced in the Seventy-sixth Congress, which approved 315 of them for a total of $826,000.[13] No later statistics are immediately at hand.

Although the full effect of the new Act has not yet been demonstrated, it is certain that the District Courts will now dispose of most of the tort claims which in the absence of the jurisdiction conferred by the Act, would continue to harass Congress.[14]

Problems of Interpretation and Construction Arise Under the New Act

A new statute covering a field previously unoccupied by legislative enactment may be expected to raise problems of interpretation and construction. The Federal Tort Claims Act is no exception. Some of its more equivocal provisions will certainly provide ample opportunity for the

2. See Opinion of Justice Iredell, *Chisholm* v. *Georgia*, 2 Dall. 419, 1 L. ed. 440; *United States* v. *McLemore*, 4 How. 286, 11 L. ed. 977; *Hill et al.* v. *United States et al.*, 9 How. 385, 13 L. ed. 185.

3. In *Chisholm* v. *Georgia*, 2 Dall. 419, 1 L. ed. 440, Associate Justices Blair, Wilson and Cushing, and Chief Justice Jay, used language which indicated a reluctance to fully adopt the doctrine in the United States. The specific issue involved in *Chisholm* v. *Georgia* was settled by the Eleventh Amendment. See *Hollingsworth* v. *Virginia*, 3 Dall. 378, 1 L. ed. 644.

4. Edwin Borchard: "Government Liability In Tort," 34 *Yale Law Journal* 229, 258.

5. See Harold G. Aron: "Federal Tort Claims Act: Comments and Questions for Practising Lawyers," 33 A.B.A.J. 229 (March 1947).

6. Rev. Stat., §1049-58 (1875), 28 U. S. C. §241 *et seq.* (1940).

7. *Gibbons* v. *United States*, 8 Wall. 269, 19 L. ed. 453.

8. 24 Stat. 505 (1887), 28 U. S. C. §§41 (20), 250 (1) (2) (1940).

9. *Hill* v. *United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862.

10. 36 Stat. 851 (1910), 40 Stat. 705 (1918), 35 U. S. C. §68 (1940).

11. 41 Stat. 525 (1920), 46 U. S. C. §742 (1940); see also 43 Stat. 1112 (1925); 46 U. S. C. 781 (1940).

12. *Sen. Rep. No. 1400, 79th Cong., 2nd Sess.* (1946) 30.

13. *Ibid.*

14. It was estimated that a measure very similar to the present Act would dispose of 40 per cent of all private claim bills, this including 80 per cent of the tort claims and practically all of those finally approved. See Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong. 2d Sess. (1942) 13

exercise of legal learning and judicial acumen.

We are confronted at the outset with the rule of construction—long exhausted by reason, but still possessing vitality—that any Congressional waiver of governmental immunity must be construed strictly and limited to its express terms.[15] The better rule might be that this Act should be construed in the way that will give effect to the purpose for which it was enacted.[16]

The Englehardt Case Before Judge Chesnut

A problem arising under the Act was recently presented to our esteemed colleague, Judge Chesnut, of the District Court of Maryland, involving the right of a plaintiff to join an individual in his suit against the Government, as a joint tort-feasor.[17] Plaintiff, a citizen of Maryland, sued the United States and a citizen of Delaware as joint tort-feasors. The individual defendant moved to dismiss the action as to her because the Act was intended, she said, "to restrict suits against the United States to cases where the United States *alone* is sued as the only defendant, and therefore it is not permissible to include an individual defendant jointly with the United States as a joint tort-feasor." In support of this motion, it was urged that under the Act the determination of factual issues was for the Court, and that the individual defendant was entitled to a jury trial under the Seventh Amendment to the Federal Constitution; that the provision limiting attorney fees could not be satisfactorily applied to a joint judgment; and that "there would probably be difficulties in the administration of the Act with respect to the admission or rejection of the evidence."[18]

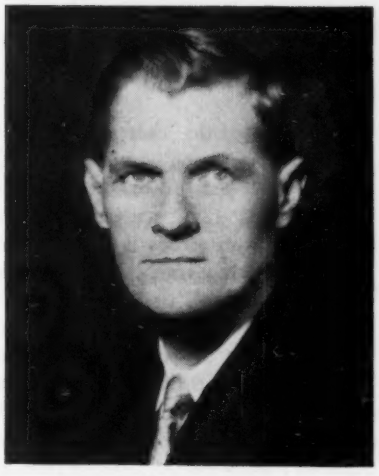
Judge Chesnut denied the motion and said in his opinion:

> After careful consideration of the whole Act I do not find any express language, or implication from the subject matter, sufficient to indicate that it was the intention of Congress to restrict suits against the United States to cases where it alone is sued. . . . And I do not think the supposed difficulties in administration with respect to possible separate determination by Court and jury, and the provision as to limitations of fees, furnish any substantial or insuperable obstacles with respect to the inclusion of individual defendants as joint tort-feasors.

Joinder of Joint Tort-Feasors As Defendants

Judge Chesnut pointed out that "instances have not been wanting in the past, both before and after the new Civil Procedure Rules, in which cases against joint defendants have been tried at one time although the verdict must be separately announced by the judge and by the jury as to the respective defendants."[19] It was also suggested that under Rule 42 (b) the Court could, if necessary, order separate trials to avoid difficulties that might arise with respect to the admissibility of evidence.

It is not strange that this specific question was presented at such an early date, since situations frequently arise involving joint tort-feasors under varying circumstances. We can reasonably expect a recurrence of this same issue involving different facts and circumstances, which may require a different result.[20] Note that in this particular case plaintiff and the individual defendant were citizens of different States. Judge Chesnut went on to say: "If, as is more likely to occur in this class of cases, the plaintiff and the individual defendant had been citizens of the same State, another and perhaps more difficult question of jurisdiction would have existed."[21]



BEN MOORE

Is the Government Entitled to Subrogation Against the Employee?

Is the Government entitled to subrogation as against the employee whose wrongful act or omission caused the injury? Certain notes appearing at the end of one section of the Act as published in USCA cite an opinion of the Attorney General to the effect that, in the absence of further Congressional action, the Government may not recover from its own employee through subrogation in such cases;[22] but this may relate only to those cases in which settlement is made by the government without suit.

In a recent article appearing in the *Yale Law Journal* it was stated that such right of subrogation would inure to the government to the same extent as to a private person in the same circumstances.[23] Reason and

15. *Schilinger* v. *United States*, 155 U. S. 163, 15 S. Ct. 85, 39 L. ed. 108; *Price* v. *United States and Osage Indians*, 174 U. S. 373, 19 S. Ct. 765, 43 L. ed. 1011; *United States* v. *Michel*, 282 U. S. 656, 51 S. Ct. 284, 75 L. ed. 598; *United States* v. *Sherwood*, 312 U. S. 584, 61 S. Ct. 767, 85 L. ed. 1058.

16. "It is now beyond doubt that in our day we shall see increasing encroachment in countries of English law upon the hitherto sacred domain of sovereign non-responsibility, and an approach to the continental theory of responsibility of the modern sovereign in its own Courts." Ernest Angell: "Sovereign Immunity—The Modern Trend," 35 *Yale Law Journal* 150, 152.

17. *Englehardt* v. *United States*, 69 F. Supp. 451.

18. Raising the questions of admissions and self-serving declarations, see Aron: "Federal Tort Claims Act: Comments and Questions for Practising Lawyers," 33 A.B.A.J. 228 (March 1947).

19. Citing *Dellefield* v. *Blockdel Realty Co.*, 1 F. R. D. 689; *Elkins* v. *Nobel*, 1 F. R. D. 357; *Munkacsy* v. *Warner Bros. Pictures*, 2 F. R. D. 380; *Mealy* v. *Fidelity Nat. Bank*, 2 F. R. D. 339; *Ford* v. *Wilson & Co.*, 30 F. Supp. 163; *Ryan Distributing Corp.* v. *Caley*, 51 F. Supp. 377.

20. See: "The Federal Tort Claims Act," 56 *Yale Law Journal* 534, 555, where it was said: "Therefore it seems inevitable that the rights of plaintiff and of the Government against others will have to be adjudicated in a separate controversy."

21. Judge Chesnut expressed no opinion relative to this jurisdictional question.

22. 28 U. S. C. A. §921, note 4.

23. See Note 177, "The Federal Tort Claims Act," 56 *Yale Law Journal* 534, 555, where it was stated: "The Government clearly would have a valid claim against the employee"; citing, Prosser on *Torts* (1941) 1114 n. 36; 2 *Restatement, Agency* (1933) §401, comment (c).

logic support such a conclusion.

The Peculiarity of the Statute of Limitations

The Act provides that claims shall be "forever barred" unless asserted within one year from the date of their origin. The peculiarity of this statute of limitations is that it contains no saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned. Such provisions are ordinarily found in other statutes of limitation, both Federal and State;[24] and where not found, I know of no modern rule of construction whereby they can be implied, especially where the right exists only by force of a statute. Therefore, the limitation of one year will probably apply to all cases, whether the claimant be under disability or not.

Questions as to Evidence and the Admissions of Employees?

In trials under the Act, questions of evidence will doubtless be presented which will not be easy to answer. For example, to what extent, if at all, is the Government to be bound by admissions of its officers?[25] Will the rule be the same as that applicable to corporations generally, or will all Government officers be deemed to be merely employees, without authority to bind the Government by any act or statement occurring otherwise than at the time of the wrongful act or omission sued on? Ordinarily, admissibility of an agent's admissions is regulated by the scope of the agent's authority. Wigmore, speaking of the ordinary rule respecting admissions of agents, says: "This question, frequently enough a difficult one, depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of evidence."[26] It is a well- recognized rule that if the declaration of an officer or agent is authorized, and uttered pursuant to some official duty, it is admissible, and this rule has been extended to include officers of municipalities.[27] Will the Courts, because of reluctance to bind or estop the United States by acts of its officers or agents,[28] enforce a strict rule of non-admissibility? Or will there be a tendency to resort to some other theory, such as considering the statement as part of the *"res gestae,"*[29] or a spontaneous exclamation,[30] or admitting it under the "verbal acts" doctrine.[31]

"Law of the Place" Where the Act or Omission Occurred

Probably no part of the Act will give rise to more perplexing problems than the provision which delimits the government's liability as being "in accordance with the law of the place where the act or omission occurred."[32] This language inevitably leads to a re-examination of the frequently considered distinction between matters of substance and matters of procedure.[33] Since no "black and white line" clearly separates the two, border line cases are bound to occur which will create many subtle distinctions.

Consider as a possible problem the application of the doctrine of *"res ipsa loquitur."*[34] Our own Circuit Court of Appeals has recently held that the doctrine is a matter of substance rather than procedure, and that its applicability must be settled by the law of the place of injury.[35] But in some States it has been held to be a matter of procedure. In a suit brought in one of those States, or for a tort originating in one of those States, what will be the proper rule to be applied against the Government?

Again, in many of the States the burden is upon the plaintiff to prove himself free from fault, while in others contributory negligence is purely a matter of defense. Is this a matter of substance or of procedure?[36] Will there be one rule as to proof of contributory negligence in some States in tort claims against the Government, and a different rule in other States?

There is a case now pending under the Act in my District, in which a novel defense has been interposed. Since no decision has been made on the point, I shall not, of course, express any opinion on the merits of the defense. The case grows out of personal injuries sustained by a veterinary surgeon while visiting the Alderson Reformatory for Women, at the request of the warden, for the purpose of giving medical treatment to livestock. He was struck and seriously injured by a Government truck. The District Attorney challenges the Court's jurisdiction to entertain the suit. His argument is: The Act makes the government liable only in circumstances in which an individual would be liable. When the site of the Alderson Reformatory was ceded by West Virginia to the United States, the State relinquished all jurisdiction, both civil and criminal. Consequently such jurisdiction was vested exclusively in the United States. Congress has enacted no legislation fixing individual civil rights in the area. Therefore, there could be no recovery against an individual for a tort committed on the premises; and, since Government liability depends on individual liability in like circumstances, there is no basis for a suit against the United States.

(Continued on page 956)

24. See 28 U. S. C. A. §262; 28 U. S. C. A. §41 (20); W. Va. Code, Chapter 55, Article 2, §15 (1943).

25. See Aron: "Federal Tort Claims Act: Comments and Questions for Practising Lawyers," 33 A.B.A.J. 228 (March 1947).

26. IV Wigmore: *Evidence*, page 119, §1078 (Third Edition).

27. *Chicago* v. *Grier*, 9 Wall. 726, 19 L. ed. 769.

28. See *Whiteside et al.* v. *United States*, 93 U. S. 247, 23 L. ed. 882; *Wilber Nat. Bank* v. *U. S.*, 294 U. S. 120, 55 S. Ct. 362, 79 L. ed. 798; *United States* v. *San Francisco*, 310 U. S. 16, 60 S. Ct. 749, 84 L. ed. 1050.

29. *Holmes-Pollock Letters*, 284-285 (1941); Pollock to Holmes, April 23, 1931: "I am reporting, with some reluctance, a case on the damnable pretended doctrine of *res gestae*, and wishing some high authority would prick that bubble of verbiage: the unmeaning term merely fudges the truth that there is no universal formula for all kinds of relevancy."

30. VI Wigmore, *Evidence*, page 131 *et. seq.* §1745 *et seq.* (Third Edition).

31. *Ibid*, page 177 *et seq.*, §1766 *et seq.*

32. 28 U. S. C. A. §931 (a).

33. See *Restatement, Conflict of Laws*, §584 *et seq.*; Goodrich: *Conflict of Laws*, page 187 *et seq.*, §77 *et seq.* (Second Edition).

34. See Aron: "Federal Tort Claims Act: Comments and Questions for Practicing Lawyers", 33 A.B.A.J. 228 (March 1947).

35. *Lachman* v. *Pennsylvania Greyhound Lines, Inc.*, 160 F. (2d) 496 (1947).

36. See *Precourt* v. *Driscoll*, 85 N. H. 280, 157 A. 525, 78 A. L. R. 874; *Restatement, Conflict of Laws*, §595, *Comment a*, §601.

2

Victory as to the Hearing Examiners: Association's Contentions Sustained in New Rules

■ The work of the present Association year under the leadership of President Carl B. Rix was climaxed, and the diligent efforts of the Section of Administrative Law were supported, in the action of the United States Civil Service Commission on August 8, in deciding as to the provisions and effect of its rules to govern the qualifications, selection, status, compensation, etc., of the Hearing Examiners, up to 350 in number, who will take office under the Administrative Procedure Act. Of the nine principal points made in behalf of our Association by way of objection to the draft of rules on which the Commission's hearing of July 9 was held, the Commission sustained eight in full and adopted as to the ninth a compromise which will need to be watched carefully as to the manner in which it is carried out but cannot be said to contravene the mandates or the intent of the Act. Qualified "outsiders" will not be placed on a parity with incumbent Examiners as to rating for appointment, but the present Examiners will be subjected to rigorous investigation, with an examination, by an independent board of "outsiders".

This signal victory on eight items and substantial victory in principle on the ninth was not won without a great deal of work, against strong opposition which at times seemed likely to have its way in the new rules. Carl McFarland, of our Association, as the non-governmental member of the Commission's Advisory Committee, "stuck to his guns" for many months in urging our Association's contentions. Chairman Wiley of the Senate Committee on the Judiciary made his interest and concern very clear to the Commission and the agencies. Chairman Sylvester C. Smith, Jr., of the Section of Administrative Law, stated and ably advocated our contentions at the hearing on July 9, and warned emphatically that any flouting of the Act would be followed by a recommendation from our Association for further legislation which would undo the mischief and even go beyond the present provisions of the Act. Many of the agencies, some of the Examiners, and their politically influential friends, fought and worked long and hard to defeat our Association's recommendations. They even resisted some of the Commission's original proposals and sought to have them relaxed and made less explicit in their requirements. But it turned out to be a losing battle for them.

The Commission's rules were not issued in time for inclusion in this issue, but we believe that the following report will enable our members to form trustworthy impressions as to what has been decided on by the Commission and will be done.

■ At the public hearing held by the Civil Service Commission on July 9, extended presentations were made by numerous organizations and individuals with varying points of view. We wish that space and time permitted us to quote from, summarize, or analyze various of these submissions, but that is impracticable at this time.[1]

The presentation for our Association as made by Sylvester C. Smith, Jr., of New Jersey, as Chairman of the Section of Administrative Law, concluded with the following frank avowal:

> May we point out that Congress was persuaded only after extensive argument not to remove Examiners from agencies altogether when it formulated the Administrative Procedure Act. Members of the Congress have indicated their intention to watch the administration of this Act. If, therefore, it is observed that early in the administration of the Act its present moderate provisions for separation of functions in the appointment of Examiner personnel is not given a chance to operate fully as contemplated by the Congress, the members of the Congress and many others who are interested in the development of the federal administrative process within the constitutional concepts will be forced to report to the interested legislative committees that further legislation will be necessary to accomplish the objectives of Congress.

1. Synopses of the hearing were made under official auspices. Carl McFarland commented on these, in his statement at the meeting of the Commission and the advisory Committee on July 16 as follows: "Since no stenographic report was made, the synopsis is all we have to go on. Yet it fails to bring out some essential points. The one-page synopsis (point 4 a.) utterly fails to bring the significance of the position of the Federal Trial Examiners Conference in the matter of promotions in grade. On page 4 of the longer synopsis this very important (hereinafter discussed) point is made even more obscure. Illustrative of the treatment of other matters, at the same page it is said that agency representatives disapprove Section 34.7 (b) because it is a departure from traditional career service—whereas the entire function of this Commission, and the whole aim of the Act, was to secure a certain departure from prior practice. Similarly, at page 5 with respect to Section 34.12 regarding the utilization of Examiners between agencies, a protest is noted against the requirement of Commission approval before an Examiner may be borrowed by one agency from another—whereas the proposed rule in fact departs from the express words of the statute which, in such cases, requires the borrowed Examiners to be 'selected by the Commission' instead of the mere 'approval' of de facto arrangements between agencies."

2 Victory as to the Hearing Examiners

Statement of Nine Principal Points Urged by Our Association

At the meeting of the Commission and its Advisory Committee on July 16, Carl McFarland of our Association stated the nine principal points, to which the Commission's action of August 8 was related. As to the first of these, the Commission adopted the compromise hereinabove stated; the other eight points were sustained by the Commission. Mr. McFarland's final submission was as follows:

(1) *Appointment of incumbents*—Anything that smacks of the automatic reappointment of incumbent Examiners will be contrary to the purpose of the statute, contrary to the good of the Examiners as a group, contrary to the interest of agencies in maintaining standards, and contrary to the course which the Civil Service Commission should follow if it is to rise to the opportunity which Congress has given it.

Even if incumbent Examiners are required to compete with outsiders, the incumbents will have the advantage, in the vast majority of cases, of specialization and length of experience. It will therefore only be the exceptional outsider that could hope to prevail over those previously in office. Therefore, the rule of Section 34.4, even if not designed for that purpose, will only have the effect of excluding superior persons from these positions for the sole reason that they are not already incumbent Examiners.

Section 34.4 will operate to perpetuate in office hearing and deciding officers regardless of their real qualifications. It will permit unfit persons to be continued in the positions, despite the fact that the Act expressly provides that these officers must be judicial in temperament and adequate in equipment. Competition between such incumbents and outside candidates would, on the other hand, not only be more democratic and fair but is probably the only method whereby as a practical matter mediocrity can be eliminated.

If, nevertheless, the Commission should be of the view that some concession be made to incumbents, perhaps the solution will lie in a "grandfather clause" which will recognize for the privilege only those who have served a period of, say, not less than ten years. But even then the premium will be placed on mediocrity merely because it has been of long standing.

(2) *Advances in grade.*—Section 34.7 (a) implies at least that advances in grade are to be determined by agencies rather than this Commission. No further departure from the purpose of the statute could be well imagined. The statute provides that both compensation and tenure are to be the sole prerogative of this Commission, and advances in grade are inextricably interwoven with both compensation and tenure—yet the rules appear to hand this matter over to agencies. If that is done, the agencies will retain the whip hand in the matter of the really important compensation adjustments and can in effect control tenure for, if an Examiner is denied advances in grade to which he is otherwise entitled, it would be better that he be discharged summarily.

In this connection, I should like to urge the Commission to study the proposals of the Federal Trial Examiners Conference which are particularly full on this point but which —as I have heretofore indicated—are imperfectly described in the summaries of the hearing; its written statement is not listed in the schedule of written submittals.

(3) *Transfers.*—Sections 34.5 (a) and 34.7 (b) at least in a measure permit examiner positions to be filled by non-competitive transfers from non-examiner positions. To the extent that it does so it is flatly contrary to the purpose of the statute. Even if it does no more than permit the appointee to receive his appointment without certification along with the top three on the register, it is contrary to the statute because it spares the agency concerned the shame of seeing and knowing that two better men are available. It subverts the statute by permitting the appointment of those who cannot be expected to bring that impartiality and superiority to the work of Examiners that the Act is designed to secure.

(4) *Quality of appointees.*—Section 34.6 on appointments wholly fails to carry into the rules the requirements of the Act that the appointees be not only of judicial temperament but "qualified and competent" to the duties imposed by Sections 7 and 8 of the Administrative Procedure Act. These are not merely hortatory words. They should be carried into the rules and expanded upon just as numerous other provisions of the Act are carried into the rules.

(5) *Conditional appointments.*—Section 34.6 (b) makes provisions for "conditional" appointments, in which the agency shall participate in determining whether the appointment shall become permanent. However, the statute contemplates that there shall be none but permanent appointments. To do otherwise is simply to suspend the provisions of the Act at the inception of an Examiner's career when that is most likely to affect his entire service in a manner completely contrary to the intent of the statute. The provision, it may be noted, is simply an attempt to write into the statute by rule the like recommendations of the majority of the Attorney General's Committee on Administrative Procedure which Congress, in adopting the Administrative Procedure Act, conspicuously ignored.

(6) *Adequacy of compensation.*—Section 34.9 relating to compensation totally fails to carry into the rules the requirements of the Act that Examiners' compensation shall be "high enough to attract superior personnel" (House Committee Report, page 47). The matter is important because, as official and unofficial studies of administrative process have been unanimous in finding, Examiners must not be inferior personnel in any agency. Nevertheless, there is a considerable drive to keep them subordinate, salary-wise, to administrators and prosecutors. The proposed rules do not bring into the open the real requirements and policies respecting compensation. In that connection I might mention

one major deficiency which has repeatedly appeared in the material submitted to the Advisory Committee—that is, that the staff of the Commission concerned with matters of classification seems to be of the view that the territorial scope of agency functions (such as rate proceedings) is the mark of importance of cases, whereas the more important factor is whether the Examiner not only hears but hears the whole case and then makes either an initial or recommended decision (as is not usually the case in rate making).

I believe that common sense and practical considerations require that the guides for the classification of Examiners and grading of the functions they perform should be stated in the rules so that all can see them. After all, that is what rules are for. The very fact that they are hidden in this instance—regardless of whether that is past policy in other matters—is not only ominous but, as I have said, there is excellent reason to suppose that they are defective.

(7) *Experience requirements.*—The experience requirements as set forth in the Examination Specification No. 851 of June 28, 1947 (attached to the tentative rules) proposes to count as required experience "administrative charge *or* responsibility for the successful completion of cases conducted before a court of record or governmental regulatory body". So far as this opens the door to appointments from among people whose experience has been the "administrative charge . . . of cases conducted before a . . . governmental regulatory body" it would include persons who are expediters, coordinators, paper-pushers, and the like who are hardly more than chief clerks or political supervisors and are without real professional experience or qualification. This is completely contrary to the requirements and intent of the statute to procure the appointment of persons temperamentally and professionally qualified to perform the high duties assigned to Examiners by the Administrative Procedure Act.

(8) *Characterization of duties.*—The statement in the Examination Specification that the duties of Examiners are "moderate and largely sedentary" illustrates the complete misconception of the arduous and difficult duties of Examiners within the framework of the Administrative Procedure Act itself and as stressed over and over again in official and unofficial studies of the administrative process. Nothing could indicate better the tendency of the proposed rules to write into them the current and long standing predilection of administrative managers to write down the status of Examiners, the correction of which was one of the major purposes of the Administrative Procedure Act.

(9) *Register of Hearing Examiners.*—Lastly, in listing important points, I should like to suggest that the rules should provide for the maintenance by the Commission of a public register of Hearing Examiner incumbents, giving the pertinent information about their status. Perhaps the Commission should also arrange some precise and adequate form of credentials which Hearing Examiners may carry. Unless these things are done, parties to administrative proceedings who believe that there is some reason to question the status of the Examiner in a given case will be either burdened with pursuing informal inquiries here or forced to challenge the credentials of all hearing officers. The reason is that a proper hearing officer is jurisdictional in any proceeding subject to the Act. There will be challenges for a variety of legal reasons, all of which Congress has clearly indicated in the terms of the Act. How serious these challenges will be will depend, of course, upon how completely these rules comply with the statute in all respects and how fully their administration similarly complies.

In this connection I might point out that, unlike some other functions of the Commission, what it does here with respect to these Examiners is a matter of law and may be challenged in any proceeding subject to the Act in which an Examiner participates.

Apart from the legal issues involved in the foregoing nine points, someone may say that some or all of these objections can or may be corrected in administration. But that will not be so for, once such rules are permitted to become operative, they will permit pressures and predilections to drive through the protective structure of the Administrative Procedure Act and thus perpetuate the system which it was a prime object of Congress to do away with.

There is another thing I would like to call to the attention of the Commission. The Advisory Committee is, with one exception, staffed with representatives of agencies and —of these—all are administrative or managerial officers rather than real Examiners or judicial officers. Hence the latter have not been effectively heard in the framing of the Examination Specification, the criteria for salaries (which, though of major importance, are not submitted with the rules and Examination Specification here under consideration), and the rules. This fact renders vulnerable the present proposals because they are drawn by people who represent the other side of the picture and who, instead of being proper persons to be in control of the writing of the rules, are adverse parties to a situation which Congress thought it was correcting.

In closing, candor requires me to say one more thing: It was only with some difficulty that Congress was persuaded *not* to remove Examiners from agencies altogether when it formulated the Administrative Procedure Act. If, therefore, it becomes established this early in the history of the administration of the Act that the more moderate method adopted will not be permitted a chance to operate fully as contemplated, those who are interested in the rational reform of administrative procedure (as well as those who have thought all along that the Administrative Procedure Act did not go far enough) will surely be forced to report that further legislation will be indispensably necessary if the object heretofore adopted is to be effectuated.

3

The Old Issue:

New Forms of Conflict Between Tyranny and Law

by **R. C. Stovall** • of the Mississippi Bar (Okolona)

■ In the following address as President of the Mississippi State Bar, R. C. Stovall, for ten years an active participant in the National Conference of Commissioners on Uniform State Laws, discussed the American system of constitutional limitations on governmental abuses of power, and decried what seemed to him the whittling away of the Bill of Rights by judicial decisions which enlarge the powers and discretion of administrative officers. The "search-and-seizure" decision of the Supreme Court in *Harris* v. *U. S.*, 67 S. Ct. 1098, seemed to him to be especially menacing to the rights of free citizens. Some judges and lawyers criticize and regret the majority decision and others think it is sound and salutary. Our Association did not join with the CIO and other organizations which asked for the reargument of the case which the Court denied.

■ "Where law ends, tyranny begins."[1] Here was the quintessence of William Pitt's political creed, the secret of his irresistible strength. This brief and simple statement is an abstract of twenty centuries of experience in government. In it, England's Great Commoner voiced a universal concept of English-speaking people.

History has taught us to revere law as the guardian of our liberty. The necessity of choosing between tyranny and law Kipling calls "The Old Issue":

> All we have of freedom, all we use or know—
> This our fathers bought for us long and long ago.
> Ancient Right unnoticed as the breath we draw—
> Leave to live by no man's leave, underneath the Law.[2]

In the rule of Queen Anne, according to Blackstone, a fearless Middlesex sheriff arrested the Russian Ambassador on the streets of London for a debt of fifty pounds. When word of the arrest reached Peter the Great, he demanded the officer's life for the gross insult to "His Excellency." We can imagine the Czar's amazement when the Queen replied that she could "inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land, and therefore was persuaded that he would not insist upon impossibilities."[3] Later an ambassador extraordinary was dispatched to the land of the Muscovites. With elaborate ceremony, he presented its despot with a copy of a brand new statute designed for the protection of foreign ministers. Diplomatic immunity was one thing, and an Englishman's guarantee against loss of life or liberty without due process of law, another, in the early eighteenth century.

Off with his head? Impossible, Your Majesty! Remember Runnymede. "We will not go against any man nor send against him save by legal judgment of his peers or by the law of the land. . . . To no man will we sell, or deny, or delay right or justice."[4] Truly, as Sir Edward Coke said: "Magna Charta is such a fellow as will have no sovereign."[5]

The law has been sword and shield in the long struggle for freedom and constitutional government. It is still a potent weapon against tyranny in every form and guise; against the tyranny of despotism or of anarchy; against the tyranny of what Madison called the "overbearing majority"[6] heedless of justice and the rights of minorities; against the tyranny of what Hamilton described as the "pertinacious minority"[7] with power of obstructing public business.

"When a good sword is in the hands of a common general," the Chinese say, "there is utterly nothing to be done about it."[8] We have

1. William Pitt's Speech in *Wilkes Case (1770)*.
2. *Collected Verse of Rudyard Kipling*, page 197; "The Old Issue."
3. *Blackstone's Commentaries*, Vol. I, page 255.
4. *Magna Charta*, June 15, 1215.
5. Debate in the House of Commons; May 17, 1628.
6. *The Federalist*, No. 10.
7. *The Federalist*, No. 22.
8. Chang Ch'ao, quoted in Lin Yutang's *Importance of Living*, page 317.

known the tyranny of bureaucratic arrogance and stupidity, of organized violence, and of rampant and ruthless individualism in our day. We must fight, as Americans have fought in other years, for individual liberty and free institutions. In the heat of battle, it is senseless to quarrel with a dependable weapon, suicidal to throw it away. If we lose ground, the fault will not lie in the temper and edge of the blue blade our fathers fashioned. The dishonor will be ours that it has fallen into clumsy and spiritless hands.

The Conditions of Freedom Are the Same in All Generations

The conditions of freedom have been the same in every generation: Recognition of the supremacy of the law, and insistence upon its wise and just administration.

These principles clashed sharply with the Divine Right theory held by James I. In the irrepressible conflict, "the lawyers," Green said, "were subservient beyond all other classes to the Crown."[9] But when James demanded the right to be heard before judgment was delivered in certain cases, the judges could find no shadow of precedent to sustain his contention. Sternly rebuked by their ruler, they apologized and promised decrees in conformity with his will and pleasure. Sir Edward Coke, the Lord Chief Justice, alone dissented.

You will remember Sir Edward as a gentleman of fine intellect, caustic speech, and uncompromising integrity. He had ruled, and the case was closed. James might storm and threaten. The King's commands could control the King's henchmen, but the Chief Justice recognized no power above the law. In this, he was supported by the weight of English authorities: "The King ought to be subject . . . to the law, for the law maketh the king."[10] According to Green, his answer to royal pressure was that "when any case came before him, he would act as it became a judge to act."[11] He recanted not a syllable when James dismissed him from the Council. "Syllables govern the world," Coke had said. The King threw his weight against the common law; Coke waited for the verdict of posterity. When he was thrown out of office, he refused to retreat an inch. And the nation stood behind his opinion. The historian says that "no act of James stirred a deeper resentment among Englishmen than this announcement of his will to tamper with the course of justice."[12]

Nearly three hundred years later, Kipling turned to this page in history for its unforgettable lesson. Be vigilant, he was saying; guard against the return of the old King under any name:

> He shall break his judges if they cross his word;
> He shall rule above the Law calling on the Lord.
>
> • • •
>
> Strangers of his counsel, hirelings of his pay,
> These shall deal our Justice: sell—deny—delay.[13]

In the resurgent tyranny of the eighteenth century, George III miscalculated. "George, be King," his mother had urged the Crown Prince. Obsessed with her advice, he underestimated the stamina of Englishmen and the passion for freedom in America. Law triumphed over tryanny when his absolutist schemes were foiled by the statesmanship of Burke and Pitt, the diplomacy of Franklin, and the sword of Washington.

Surely no statesman ever loved his country with a more selfless devotion than William Pitt, or had a higher conviction of destiny in her service. But he knew he could never save England by surrendering principle

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to expediency and closing his eyes to corruption in high places. He refused positions of influence and authority unless he could hold them on his own terms. For he had sworn allegiance to a sovereign stronger than self-interest, more majestic than any King—the Law of the Land. "I will not go to Court," he said, "if I may not bring the Constitution with me."[14]

Adherence to the Impartial Application of Law is the Negation of Arbitrary Power

To the judge who is worthy of his high office, the law is a rule, of universal application, in force until changed by an established method. Adherence to this fundamental precept would lift our Courts above politics, prejudice, pet ideologies, and every other pitfall that leads to oppression and injustice. A substantial rejection of it will mean a government by men and not laws, and that government is tyranny.

You will recall that Blackstone defined law, first of all, as a rule. "Not a transient, sudden order from a superior to or concerning a particular

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Concerning the Author: Robert Clark Stovall was born in Mississippi in 1899, and was educated at the University of Mississippi and at Columbia in law. During World War I he served as a private in the 81st Field Artillery, AEF. He has practised law actively as a member of the firm of Stovall and Stovall in Oklahoma. In 1943 he was a State Director of the National War Fund and in 1945 the President of the Mississippi War Fund. From 1935 to 1945 he was a member of the National Conference of Commissioners on Uniform State Laws. He has lately concluded his term as President of the Mississippi State Bar.

9. Green's *Short History of the English People*, Chap. VIII, page 486.
10. Bracton, quoted in *Blackstone's Commentaries*, Vol. I, page 234.
11. Green's *History of the English People*, Chap. VIII, page 486.
12. *Ibid.*, page 487.
13. Kipling's *Collected Verse*, page 199; "The Old Issue."
14. Green's *History of the English People*, Chap. X, page 750.

person; but something permanent, uniform and universal."[15] "It is an established rule to abide by former precedent where the same points come again in litigation; . . . to keep the scale of justice even and steady and not liable to waver with every new judge's opinion."[16]

The founders of our government accepted his definition. We read in *The Federalist:* "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"[17]

Our Courts Must Be "Mere Instruments of the Law"

John Marshall, the ablest judge in American history, time and again stated the obligation of the Court to regard the law as a rule. "Judicial power, as contradistinguished from the power of the laws, has no existence," he said. "Courts are the mere instruments of the law, and can will nothing."[18] Again, "This Department can listen only to the mandates of law."[19] And again, "It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics."[20]

You are familiar with the ancient maxim: "Wretched is the thralldom where the law is either uncertain or unknown." How wretched, the lawyer is of all men best qualified to say.

The doctrine of the stability of laws and of their continued active existence until changed by orderly process applies with peculiar force to the supreme law of the land, the Constitution of the United States. In recent years, by legislative encroachment and judicial construction contrary to its letter and spirit, attempts have been made to evade or override its express provisions.

The Oblique Approach to Revision of the Constitution and Denial of Rights

The oblique approach to revision of the Constitution through act of Congress or judicial interpretation avoids the publicity and precision of a constitutional amendment. As Burke insisted: "The people never give up their liberties but under some delusion."[21] The advocates of radical change are loath to state the issue in clear and exact terms for approval or rejection by the citizens of the United States, as provided in our fundamental law. They know the American people would prefer the unchanging rights of man to the convenience of the hour, and law to tyranny.

The responsible architect who would remodel a building will submit a blueprint to the owner and not begin by destroying the foundation. John Marshall held in *Cohens* v. *Virginia:* "The people made the Constitution and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them."[22] The self-styled architects who would undermine the foundation of the Republic are, I believe, a lawless subdivision only of the American people.

When we deny the force of law as a uniform and universal rule, we are destroying the foundation of individual liberty and constitutional government. "Where law ends, tyranny begins."

The Chinese satirist, Lusin, as translated by Dr. Lin, told of "a ruffian in Tientsin during the Boxer trouble who always demanded two dollars for carrying a person's luggage. Even if the luggage was very light, he said he wanted two dollars. Even if the distance was very small, he still wanted two dollars. Even if the person didn't want him to carry the luggage at all, he still wanted two dollars."[23] And Lusin thought his conduct execrable, a normal reaction in that country. For the Chinese are individualistic to the core, with a very solid respect for property rights among all classes. In this, they resemble our forefathers.

The Supreme Court's Decision in the Teamsters' Case

Lusin has joined his ancestors, and there is no sequel to the story. We do not read that a particularly independent Chinese, who wanted to carry his own luggage and resented the two-dollar tribute, took the matter to court, where one group of Chinese judges held: "It is perfectly legal. Pay him the two dollars or settle the argument his way;" while one judge argued: "You should hold your wallet; you are being robbed;" and a member of the court was known to travel generally on the theory that a certain amount of ebullience must be expected under such circumstances. It is the absence of court procedure principally that distinguishes the Tientsin affair from the case of *United States* v. *Local 807 of International Brotherhood of Teamsters.*[24]

Let us suppose that, instead of one luggage carrier, there were a number of them, united and operating at all approaches to the city; that they wanted to carry milk, farm produce and other commodities; that their fee was eight or nine dollars instead of two; and that this happened in New York instead of Tientsin. The analogy completes itself.

You are familiar with the majority opinion in the case, which denied that the Teamsters' demands and method of enforcing them violated the Federal Anti-Racketeering Act. And you will also recall the dissent of the late Chief Justice Stone to the effect that, according to the line of reasoning followed by his associates,

15. *Blackstone's Commentaries*, Vol. I, page 44.
16. *Ibid.*, page 69.
17. *The Federalist*, No. 62.
18. *Osborn et al.* v. *Bank of the United States*, 9 Wheat. 738; 6 L. ed. 204, 234.
19. *Craig et al.* v. *Missouri*, 4 Peters 410; 7 L. ed. 903, 913.
20. *The Nereide* (Bennett, Master), 9 Cranch 388; 3 L. ed. 769, 780.
21. Speech at County Meeting of Bucks (1784).
22. *Cohens* v. *Virginia*, 6 Wheat. 264; 5 L. ed. 257, 287.
23. *Wisdom of China and India*, an anthology edited by Lin Yutang, page 1088.
24. 315 U. S. 521.

common law robbery would be an innocent pastime.[25]

"Lawful Labor Practice" or Highway Robbery?

A divided bench may be evidence of the elusive quality of justice. At times absolute and exact rights tend to meet, and their sharp outlines become blurred and lost in the legal shading on each side of a question. But it seems rather odd that members of the Supreme Court of the United States would fail to agree as to whether conduct was a lawful labor practice or common law robbery. It is strange law that deprives a farmer of the right to carry his produce in his own truck over public highways and streets, without paying tribute to a union that insists on serving him, willy-nilly, or on collecting a fee regardless. The farmer who stood by Concord Bridge and "fired the shot heard round the world,"[26] must wonder at the legal or illegal strait-jacket the Court has slipped on his descendants.

This decision is an illogical but dangerous attack on a fundamental principle of our democracy. We have heard scornful reference to base souls who would place property rights above human rights. This, of course, is demagogic claptrap and means nothing. As James M. Beck said in 1924: "Property has no rights. But persons have a right to property, and in the last analysis, the right to property is the right to work and to enjoy its fruits."[27] To refuse men that right is to renounce economic freedom.

More is involved here than the actual legal effect of such a decision in out-of-pocket loss from tribute money. We are accustomed to think of Americans as independent, conscious of their dignity and worth as individuals, and tenacious in defense of their liberties. These traits are part and parcel of our Anglo-Saxon inheritance. Burke had them in mind when he tried to explain to an obstinate and stupid British ministry and king the source of bitter resentment in the American colonies. "Men may be sorely touched and deeply grieved," he said, "in their privileges as well as in their purses. Men may lose little in property by the act which takes away all their freedom. When a man is robbed of a trifle on the highway, it is not the twopence lost that constitutes the capital outrage."[28]

A Local Instance of the Contagion of Lawlessness

Nothing is more contagious than lawlessness. Not long ago, it seems, the dairy farmers of this section took a leaf from the Teamsters' notebook. A citizen of Italian ancestry from a town in the Delta started to New Orleans for a load of vegetables. Disorder was rife, but he knew nothing of the ferment among the milk producers. He was peacefully traveling down the highway when sharply commanded to halt. Naturally enough, he mistook the embattled farmers for highway bandits, stepped on the gas, and escaped with souvenir bullet holes in the body of his employer's truck.

It was purely a case of mistaken identity and lack of information. The pickets had no intention of shooting up a vegetable truck or murdering its driver; their purpose was to stop the delivery of milk. Nor had the vegetable man consciously crossed a picket line. He was minding his own business and doing his day's work, when fate cast him for this perilous role in a roadside melodrama.

This man is an American citizen. Our country is at peace. He has been endowed by his Creator with the "unalienable rights" of "Life, Liberty and the pursuit of Happiness."[29] He is living under a Constitution adopted "to establish Justice, insure domestic Tranquility, and secure the blessings of Liberty"[30] to him and his posterity. And yet his property rights were violated, his liberty restrained, and his life gravely endangered. The moral may be that anything can happen in a country where fundamental laws are ignored or virtually suspended at will. "Where law ends, tyranny begins."

Last month I was startled by a headline: "Court Upholds Police Search without Writ."[31] It sounded like a return to the time of George III.

Perils Implicit in the Decision in *U. S.* v. *Harris*

You will remember the facts in *Harris* v. *United States*.[32] Five FBI agents went to the lodging of George Harris, looking for stolen canceled checks, which he was believed to have used for fraudulent purposes. A five-hour search of his four-room apartment, in which "nothing was left untouched or unopened,"[33] revealed no trace of the checks. But buried in a bureau drawer, in an envelope marked "personal papers", they found certain draft classification notices and registration certificates improperly in his possession. It was a conviction for violation of the Selective Service Act, based on this evidence, as you will recall, which the Supreme Court upheld.

Justice Murphy rendered a strong dissenting opinion, in which he asserted that the Court had "resurrected and approved, in effect, the use of the odious general warrant or writ of assistance, presumably outlawed from our society by the Fourth Amendment."[34] "That this decision converts a warrant for arrest into a general search warrant lacking all the constitutional safeguards is demonstrated most plainly by the facts," he said.[35] "Freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution.... The implications of what has been done in this case can affect the freedom of all our people."[36]

General Warrant has a very ugly history. The men who framed the Fourth Amendment knew that, now

25. *U. S.* v. *Local 807 of I. B. T.*, 315 U. S. 521 at 540.
26. "Concord Hymn," by Ralph Waldo Emerson.
27. James M. Beck's *Constitution of the United States*, page 154.
28. Burke's "Speech on Conciliation with America," March 22, 1775.
29. Declaration of Independence.
30. Preamble to the Constitution of the United States.
31. *Chicago Tribune*, May 6, 1947.
32. *Harris* v. *U. S.*, 67 S. Ct. 1098.
33, 34, and 35. *Ibid.*, at 1113.
36. *Ibid.*, at 1118.

and then, the guilty might elude an officer hemmed in by its provisions. But what concerned them far more, they felt it was sufficiently explicit to prevent a tyrannical exercise of power. It was designed to afford maximum protection to all citizens from arbitrary and unjust criminal procedure in the execution of a warrant for arrest or search. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[37]

Destruction of the Fourth Amendment Endangers Our Freedom

When we destroy the Fourth Amendment, a man's house will no longer be his castle. Fishing expeditions to uncover secrets, either for malice or profit, may become the order of the day. And pliant officers will be made the instruments of personal vengeance or political persecution.

A citizen's evasion of the obligation to serve his country in time of war is a serious offense. The evidence, illegally obtained, would indicate that Harris sought to accomplish this by an unlawful alteration of selective service records. But the FBI in order to convict him, unlocked the cell of a public enemy a thousand times more dangerous than the prisoner at bar. I am unwilling to trade the Fourth Amendment for the conviction of a draft dodger.

The FBI has an enviable record of able, energetic and faithful performance of duty in war and peace. The American people are proud of the standard it maintains in the character and training of its agents. It is in no spirit of criticism of a splendid organization that I say I hope they will be more careful of the Constitution, in spite of the Court's decision. I believe our people would tell them: The treasures you handle, gentlemen, came to us from Americans who loved freedom more than life. Time has not impaired their intrinsic value and usefulness. If you are unable to make an arrest or search without destroying a portion of our Bill of Rights, let one man's guilt go unpunished, and spare our safeguards for our children and our children's children. "Where law ends, tyranny begins."

Americans Now Have to Face "The Old Issue"

In his Address to the King in 1777, Burke asked: "What, Gracious Sovereign, is the empire of America to us, or the empire of the world, if we lose our own liberties?"[38]

Would great riches or world power compensate us for the loss of freedom?

We face the Old Issue. We must choose between Law and tyranny. Possessions beyond price are in the balance: our civil liberty, our free institutions, and our religious faith. Somewhere on the road to tyranny, men lose their sense of spiritual values and worship false gods. Our fathers believed that a man's creed determined his character, and that our country's religion was the source of its strength and honor. May we claim our heritage of Christian principles. May we have their faith in the Living God, whose truth has made us free.

> America! America! God mend thine every flaw,
> Confirm thy soul in self-control, thy liberty in law.[39]

37. Constitution of the United States, Amendments, Article IV.
38. Burke's "Address to the King," 1777.
39. "America the Beautiful," by Katherine Lee Bates.

The Qualities Which Made Cicero Great

And in the main the force of his (Cicero's) life was spent for things that transcend time and place. As philosopher, as literary artist, as lawyer, he was constant to truth, to beauty, to justice. And the more he sacrificed in his day for these eternal verities the more we glorify him in our day. Because he endured against odds and withstood the hostility of life; because he labored wisely and was clear-headed in spite of prejudice, and fair-minded amid cruelty; because he was kind and generous to the undeserving; because he was influenced not by personalities, but by principles; because he obeyed his convictions regardless of the cost and gave up life itself on the chance that his faith was true; because in a word he was not the victim of his vanity or passions but ordered his life according to reason and the law of man's better nature, we consider him a great man. What he said to Gaius Aquillius might well serve as his own epitaph:

"So just and virtuous a man that he seems to be a lawyer by nature."

—From *The Eternal Lawyer: A Legal Biography of Cicero*, by Judge Robert N. Wilkin; published May 9.

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Learned Hand:

Senior Circuit Judge – Second Circuit

■ One of the best-known and most admired of American jurists is Learned Hand, Senior Circuit Judge of the Second Circuit which consists of New York, Connecticut, and Vermont, and has to cope with the great volume of judicial business which finds its way into the federal Courts of the metropolitan area.

The Circuit Justice is Robert H. Jackson.

Circuit Judges, beside Judge Learned Hand, are Thomas W. Swan, Augustus N. Hand, Harrie Brigham Chase, Charles E. Clark, and Jerome N. Frank.

There are six districts and twenty-five district judges in the Circuit. They are John C. Knox, Henry W. Goddard, William Bondy, Francis G. Caffey, Alfred C. Coxe, George Murray Hulbert, Vincent L. Leibell, John W. Clancy, Edward A. Conger, John Bright, Simon H. Rifkind, Robert A. Inch, Clarence G. Galston, Mortimer W. Byers, Matthew T. Abruzzo, Harold M. Kennedy, Stephen W. Brennan, Edward S. Kampf, John Knight, Harold P. Burke, Carroll C. Hincks, J. Joseph Smith, James P. Leamy, Harold R. Medina, and Leo F. Rayfiel.

Retired district judge is Harland B. Howe.

An editorial on page 911 of this issue comments upon our series of cover portraits and sketches of the Senior Circuit Circuit Judges.

Sketch of Judge Hand's Career

■ The preparation of the opinion in the *Matter of Learned Hand, Senior Circuit Judge,* is a tough assignment to meet. The subject-matter is complicated; here is is no simple-minded countryman, but a man with a first-class mind who has over a long judicial career used it in that most unusual of human endeavors, the thoughtful consideration of hard problems. Then, too, the difficulty of the present assignment is increased by the fact that others have, with great ability, written on the same theme within the past few months. The comment begins with a very good article in *Life* magazine accompanied by photographs. It was written for a lay audience, of course, but it was straightforward and interesting.

The fact that a popular weekly carried a feature article about a federal judge who did not have the glamour of a Supreme Court title is itself a noteworthy fact. Federal judges are not much in the news except when they are presiding in a litigation concerning people who are. Except to the lawyers who are in cases before them, Circuit Court judges are perhaps the least known of all the people who hold public office. No man has lived his life less with an ear tuned to public acclaim than Judge Hand. Yet there he was, with a handsome full-page photograph, written about for the benefit of thousands of people, many of whom could not have known that there are such things as federal Circuit Courts of Appeals, much less what they do.

But not only has Judge Hand been explained to the laity; the members of his own profession have discussed him recently with great thoroughness. The *Harvard Law Review,* which we may call the New York *Times* of the legal magazines, devoted its February number to him. Papers by writers of distinction presented a careful study of many phases of the activities of this beloved judge. They told of his literary style, his technique in statutory interpretation, his clear thinking and understanding of patent law, his contributions to the law of crimes. And, finally, there is the affectionate but searching analysis made by his friend and former colleague, Judge Thomas Thacher, at the presentation of the Platt bust of Judge Hand to the Harvard Law School on last April 2 (33 A.B.A.J. 476; May, 1947). What can others now glean in a field where so many able reapers have harvested?

Findings of fact are easily and briefly written. Learned Hand was born in Albany, New York, on January 27, 1872. He got three degrees from Harvard by studying for them: an A.B. in 1893, a Master's degree in

1894, and his law degree in 1896. The statement that the degrees were awarded because the recipient studied for them is an inference from the fact that they were awarded in course. It is based on the assumption that an institution would not award three degrees to a student unless he did study. For him academic distinctions *ex honoris causa* have been plentiful as blackberries. They have come from Columbia, Yale, Pennsylvania, Amherst, Dartmouth, Harvard and Princeton—a collection which still leaves the Judge behind Dr. Nicholas Murray Butler, but is a fine one, nevertheless.

Learned Hand was admitted to the New York Bar in 1897, practiced law in New York City, and was a doughty opponent in civil cases as well as a trusted adviser of business concerns. In 1909 he was made a federal District Judge by President William Howard Taft. Probably many persons who behold and admire the gifted jurist, one of the finest appellate minds of our generation, have not pondered the fact that Learned Hand was first of all a lawyer of marked ability and experience and that he was appointed to the bench because he was a well-trained lawyer. As a District Judge in the Southern District of New York, struggling with the great volume of run-of-mine work which afflicts such a judge, he was vastly industrious, fearless, painstakingly fair, and skilful in the dispatch of business. In some conspicuous cases, his decisions were disappointing to political "radicals" who looked on them as "probusiness", so that he was then denounced by men of the type who now acclaim him as an outstanding "liberal". The fact is, of course, that he was merely doing what a capable and honest-minded judge should do.

In recognition of the quality of his work and the acclaim of the Bar, he became a Circuit Judge in the Second Circuit in 1924, by appointment of President Calvin Coolidge. This produces, as a matter of arithmetic, thirty-eight years of continuous service on the federal bench, listening to argument, writing opinions. That quantity is the least important test of the effectiveness of a man's judicial work lawyers will agree, although some newspaper people appear to think to the contrary. But it may be recorded in passing, for whatever significance it may have, that in the thirty-eight years Judge Hand has filed 637 opinions during his years as a District Judge and 1192 as Circuit Judge.

A Superb Jurist

It is this crop which has caused at least one of his colleagues and a considerable number of lawyers to refer to Learned Hand as the best judge in America. That is obviously a judgment, the correctness of which is incapable of proof by demonstration. After all, it does not matter. Judge Hand is a superbly good judge, and all members of the legal profession who know anything about the matter agree on that. That fact is more significant than the question whether he occupies a pinnacle by himself or whether he may share it with a very limited group.

What is it that has brought this Judge to such a completely secure position of eminence as determined by the appraisal of those in his profession? One calls to mind the remark supposedly attributed to Edison that "Genius is not inspiration; it is perspiration." If Edison said that, he was talking nonsense. A man does not become great by working hard, as the life of any mediocre plodder will demonstrate. Probably few arrive at greatness without working hard. If any do, Judge Hand is not one of them, for he is a hard worker, and a thorough worker, and only a moderately rapid worker.

To attain greatness in any intellectual pursuit—and certainly the judicial side of the law is an intellectual pursuit—one must have a good mind. He cannot wish himself into it; either nature has given it to him or not. Judge Hand was lucky enough to receive the gift. The fact that his mind, or personality, or what you will, has a philosophic bent helps also. Judge Hand gloried in his philosophy courses in college; he remembers his teachers and what they said; and he still likes to read books on philosophy.

Training and Will-Power Characteristic of the Good Mind

A good mind must be trained. Some men by force of circumstances are compelled to train themselves. That was true of many lawyers of a past generation. It would have helped them, as it helps any man, to have had the benefit of training by other good men. Judge Hand had such training. He was at Harvard during the days of some great teachers both in the college and the law school. He remembers them well and he likes to talk about them.

A good mind, well trained, thinks clearly, assuming that its owner has the willingness and capacity to make that mind work. We used to call such capacity will-power. What the present day psychologists would call it may be something entirely different. Perhaps what we used to call will-power is now explained as a part of the operation or non-operation of ductless glands. Whichever it is, it comes in a category of gifts received from Mother Nature. Whatever it is called and wherever it comes from, Judge Hand has the capacity. He has thought hard about things, particularly in the law, but not solely there, all through his adult life. It is a delight to see him break down a complicated case, discard the unimportant or irrelevant, and go to work on its main propositions. That delight can be had over and over again by anyone who will read, almost at random, two dozen of his opinions.

Judge Hand's Ability to Write Clear and Pungent Opinions

If a man is to make an impression with thoughts that are put into words instead of with tangible things, he must be able to use language. Many people write obscurely because they do not think clearly. Some write badly because they have not mastered the art of writing. That includes many judges, perhaps a numerical majority. Part of good writing is a natural gift, but a great deal of it

comes from taking pains. At any rate, that is true of the kind of writing judges do, and it may be applicable to poetry writing also.

Judge Hand can write, and it is worth reading one of his opinions just to see how well he does it. He has not the epigrammatic, though sometimes obscure, quality of Holmes. He is not as ornate as Cardozo who, though he wrote with great beauty, seemed at times just a little too highly polished. Judge Hand's language is plain but picturesque. You see immediately what he is after, and its very pungent clarity carries persuasion.

Paragraphs That Illustrate His Thought and Style

Here are a few examples which are thrown in for the mere pleasure of the words:

> The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.[1]
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> Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.[2]
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> • • •
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> Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell.[3]
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> Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.[4]
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> War is not the release of primitive combative instincts; it is an enterprise conducted for purposes consciously understood, whose realization gives to it its only rational significance.[5]
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> • • •
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> There is no more likely way to misapprehend the meaning of language—be it in a Constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a Court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.[6]
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> . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[7]
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> The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise.[8]

His Alertness Continues His Legal Training and Growth

Two more points remain. One is the continuing nature of Judge Hand's legal training. This ought to be true of every judge, but everyone knows it is not. Judge Hand keeps on thinking. He likes new ideas in the law as well as elsewhere. He has for many years been Vice-President and a member of the Council of the American Law Institute and has sat through hours and hours of discussion on legal points far from the field of a federal judge. His interest never sags.

At the close of the sessions of the Institute's meeting this year the attendance had dwindled down so that there were comparatively few members present. The subject under discussion was Investment Instruments, the field in which the Reporters are endeavoring to block out for proposed legislation the distinction between rules which should apply to a railroad bond, for instance, as distinguished from a sixty-day merchant's promissory note. The material was new, hard, and technical. Judge Hand was among those who were remaining. He had been the speaker at the dinner the night before and could well have been excused from further participation. But he and two or three others started probing; and the result was that the smallest session of the Institute's meeting, so far as numbers were concerned, became the liveliest and most helpful to the Reporter, of the three days' discussions. This constant alertness has characterized Judge Hand over all his years and it does not flag a particle as the years go by.

Cap all this with experience. Much as the young dislike the fact, the veteran knows more than the recruit and, even more, makes better use of what he knows. Of course, experience is not enough by itself. There are plenty of men who get worse as the years roll on in their jobs. It is the good man who grows by it, and Judge Hand is a good man.

Like other thoughtful men, his mood is sober these days. He was

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1. *United States* v. *Adams*, 126 F. (2d) 774, 775 (C. C. A. 2, 1942).
2. *Helvering* v. *Gregory*, 69 F. (2d) 809, 811 (C. C. A. 2, 1934).
3. *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F. (2d) 49, 55 (C. C. A. 2, 1936).
4. *Spector Motor Service* v. *Walsh*, 139 F. (2d) 809, 823 (C. C. A. 2, 1944).
5. *Commercial Cable Co.* v. *Burleson*, 255 Fed. 99, 105 (S. D. N. Y. 1919).
6. *Central Hanover Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 159 F. (2d) 167, 169 (C. C. A. 2, 1947).
7. *Cabell* v. *Markham*, 148 F. (2d) 737, 739 (C. C. A. 2, 1945).
8. *In re Fried*, 161 F. (2d) 453, 465 (concurring opinion) (C. C. A. 2, 1947).

speaking from the depths of his being at the Law Institute dinner in June about the state of affairs in the world, and about the war, and what the Institute had been doing while other men died. "We have been searching for something," he said, "vague and uncertain as it is, which at least has a kind of authority and a kind of majesty and a kind of command before which the individual instinctively, even though it be no more than that, has been able to survive against the conflicts which meet all rules which men provide. . . . Except as mankind shall learn something, his fate is indeed dreary and dread . . . and we may begin as our ancient forefathers began, even with . . . the first beginnings, to work our weary way back again. . . . We have tried to help, to keep . . . at least a trickle of reason in the affairs of man which alone will save him from the depths of savagery to which he may return . . .".

Judge Hand's Stirring Concept of "The Spirit of Liberty"

And, finally, we may end this sketch with the statement from the Judge which is taken from the speech he made at the request of his son-in-law on the occasion of "I Am an American Day" not so very long ago. The keen ears of an enthusiastic New York editor picked this speech up first. It got around into other publications afterward, and its reception was a great surprise to its author. It is too good to require comment, and it tells more about Learned Hand than any of us can by our own words:

> The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten: that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

New York Times Supports Bar Association Recommendations for Courts-Martial Reform

■ The one most important, and most controversial, change suggested in the system of military justice by a House subcommittee is that which would make the Judge Advocate General's Office a branch of the Army divorced from the line, with a separate promotion list. Bar Association committees that studied the problem, including the committee appointed by the War Department itself, were unanimous in the conclusion that such action is a fundamental and necessary reform.

We believe that adoption of this change would help to bring military justice more nearly into line with civilian standards, to remove suspicion from courts-martial decisions and reviews, and to give the accused soldier a feeling that his alleged transgression was being properly considered on the evidence and decided according to the law. There should be no fundamental difference in the application of military law and of civilian law. The law is different. It has to be. But its application should be the same. In civilian life a man cannot be charged, prosecuted, judged, sentenced and then have his sentence reviewed by the same individual. Yet that is the situation in effect in the Army.

In a peacetime volunteer Army the present system of military justice works well enough. The Army man accepts his special place, the special rules that are applied to him, the special kind of justice that is meted out. But in national emergencies, in wars, the armies of the United States are filled mainly with men fresh from civilian life. Their encounters with the military system are harsh enough, without the added one of a different conception of justice and of administration of laws.

Most of the other suggested reforms—permissible seating of enlisted men on courts trying enlisted men; subjection of officers to courts-martial for offenses similar to those warranting courts-martial for enlisted men; right of the accused to demand counsel during pre-trial investigation; and the several others also seem to us to be sound. They could have little meaning, however, if the fundamental reform of an independent Judge Advocate General is not also accepted.

Everyone has agreed that under the system that was in effect during the war injustices were done. Careful studies have been made of the reasons. Most of the Bar Association committees have included young lawyers who had themselves served in the Army during the war and knew at first hand what these injustices were and had first-hand knowledge on which to base their decision as to the cause. Their unanimity on the necessity for an independent Judge Advocate General thus carries added weight. We hope that the suggested Army reforms are adopted and that similar reforms for the Navy also will be adopted. The Navy bill is still in committee and hearings have not been held.

—Editorial in New York *Times,* July 14.

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Judicial Conferences:

First, Second, Third, Fourth and Seventh Circuits

First Circuit Develops Instructive Sessions

■ The Seventh Annual Conference of the judges and designated members of the Bar for the First Judicial Circuit consisted of the Circuit and District Judges, the Director of the Administrative Office of the United States Courts, the United States Attorneys, the Dean of each law school, three delegates from the Bar Association of each State in the Circuit, and twelve delegates appointed from the Bar, by a Circuit or District Judge, under Rule 40 (3) (d) of the Circuit Court of Appeals Rules. Arthur J. Charron, Clerk of the Circuit Court of Appeals for the Circuit, was the Secretary of the Conference, which was held at the Federal Building in Boston on June 17 and 18.

The first afternoon was devoted to an executive session of the judges to consider the state of judicial business in the Circuit. Director Henry P. Chandler of the Administrative Office spoke informally at this session. It was voted unanimously to endorse S. 17, S. 18 and S. 19, the three bills with relation to juries in the federal Courts which were drafted by a Committee of the Conference of Senior Circuit Judges headed by Judge John C. Knox. The Circuit Conference also endorsed a proposed amendment to Section 64 b of the Bankruptcy Act drafted by the Bankruptcy Committee of the Conference of Senior Circuit Judges headed by Judge Orie L. Phillips.

The Circuit Conference considered two draft bills proposed by a committee of the Conference of Senior Circuit Judges headed by Judge John J. Parker, relating to substantive and procedural aspects of *habeas corpus*. Both draft bills were unanimously approved.

At the session in the Circuit Court of Appeals room on June 18, at which representatives of the Bar were present, there was a lively discussion of the new changes in the Federal Rules of Civil Procedure. Professor Edmund M. Morgan of the Harvard Law School opened the subject. Developments under the Administrative Procedure Act were next presented, with District Judge Charles E. Wyzanski, Professor Milton Katz of the Harvard Law School, and Ralph H. Cahouet of the Massachusetts Bar, taking the lead. The participants in these panel forums did not read formal papers and the discussion was not transcribed.

The luncheon session proved to be wholly social. The Circuit Justice for the Circuit, Associate Justice Felix Frankfurter of the Supreme Court, and Attorney General Tom C. Clark, who were scheduled for addresses, pleaded pressure of official business at the last moment and did not come up from Washington.

Second Circuit Acts as to Proposed Legislation

■ The annual Judicial Conference of the Second Circuit was held in the United States Court House in New York City on June 24. Senior Circuit Judge Learned Hand presided at the one-day business meeting of the Circuit and District Judges and the United States Attorneys in Connecticut, New York and Vermont, devoted particularly to the consideration of legislative proposals before the Conference of Senior Circuit Judges. Luncheon was served in the rooms of the former Federal Lunch Club through the courtesy of Mrs. Marjorie S. Coleman, Librarian of the Circuit Court, and her assistants. Circuit Judge Gunnar H. Nordbye of Minnesota was a guest and spoke briefly at the close of the Conference.

The session was first addressed by Henry P. Chandler, Director of the Administrative Office of the United States Courts, who spoke of the questions which arose concernng 1948 appropriations for judges' secretaries and law clerks, the problems in properly presenting before the Congress bills affecting the Courts, and the need for making all practicable economies in the operation of the Courts. Some of the matters have been several times adverted to in the JOURNAL (July issue, page 695; August issue, page 802).

Judge Learned Hand and Judge John C. Knox both told of the debt owed to Mr. Chandler as a valiant and intelligent friend of the federal judicial system. On motion of Judge Knox the Conference unanimously extended a vote of thanks to Mr. Chandler for what he has done for the judiciary of the country as a whole.

Consideration of the various legislative proposals was had upon the report of the Conference's Legislative Committee through Judge Byers as chairman, assisted by the other members – Judges Bright, Hincks, Knight, and Leamy. Among the proposals approved by the Conference was that for the amendment to Section 64b of the Bankruptcy Act to place claims of interim creditors on an equality with the scaled-down claims of original creditors, in reorganization or other arrangement proceedings upon a failure of the original plan; the bills concerning habeas corpus proceedings involving jurisdiction with reference to State Court convictions of crime, and procedure with reference to federal convictions (with a direction to Judge Bright to convey to the proponents of the measures certain suggested changes of detail); and the three bills concerning federal jurors, including the proposal of uniform qualifications for such jurors.

As requested by the Senior Circuit Conference, the Second Circuit Conference heard reports and took action recommending the elimination of some District Court sessions held unnecessary for the dispatch of public business. It also gave consideration to possible duplication in clerks' offices, but found little change possible in this respect in the Second Circuit. Discussion was also had as to the assignments of Referees, made at the recent session of the Senior Circuit Conference, and as to the respective locations of Referees' offices and hearings.

The conference voted to ask a reconsideration by the Senior Circuit Conference of its refusal to order the recording of a final judgment in the district where an indictment had been returned, when trial was had in another district, as permitted in certain cases under the new criminal rules. It also appointed the six senior District Judges of the Circuit as a committee to consider any possible economies in the general conduct of the business of the Courts. The Conference voted reappointment of its Legislative Committee, with power to fill any vacancies arising in its membership.

Jury System Studied by Third Circuit

■ The foreman of a grand jury and three petit jurors, one of whom was a woman, provided an interesting and stimulating innovation at the Conference of the Third Judicial Circuit, held at Atlantic City, New Jersey, on July 7-9. In their statements regarding the operation of the Courts as seen by laymen, they were, generally speaking, in agreement that jury service is interesting and important, but that more jurors are called than are needed, that the time of jurors is wasted by the lack of a continuous flow of cases for trial, and that there is in general not sufficient explanation of the functions of juries and of the mechanics of jury service. Senator John E. Toolan, of Perth Amboy, New Jersey; Thomas D. McBride, of Philadelphia; and James Morford, of Wilmington, Delaware, trial lawyers from the Circuit, were also on the panel, which included Judge William H. Kirkpatrick, of the Eastern District of Pennsylvania, who proposed the appointment in each district of a committee of lawyers to study possible improvements in the administration of the jury system and in Court administration.

Former Attorney General Francis Biddle, who represented the United States on the International Military Tribunal, discussed the Nuremberg trial and some of the personalities connected with it, at the formal dinner of the Conference. The program of the final morning included addresses by Dean Earl G. Harrison of the University of Pennsylvania Law School and Chief Justice Bolitha J. Laws, of the United States District Court for the District of Columbia.

At the executive session of the judges on the first day, presided over by Senior Circuit Judge John Biggs, Jr., Justice Harold H. Burton, of the Supreme Court, the Circuit Justice for the Third Circuit, spoke informally. It was resolved that pending bills with reference to habeas corpus procedure be approved with suggested amendments. The method of selection of federal jurors was discussed, and pending bills relating to the selection and compensation of jurors in the federal courts (S. 17, 18, and 19) were endorsed, with a recommendation to increase the amount proposed for subsistence of jurors. Methods of jury selection at present used in the Circuit were criticized by Hyman Schlesinger, of the Pittsburgh Bar. The Senior Circuit Judge was authorized to appoint a committee "to study the operation of the jury system in the light of recent decisions of the Supreme Court."

Those present regarded the tenth annual Conference as one of the most instructive that has been conducted in the Circuit.

Fourth Circuit Has Diversified Program

■ The Seventeenth Judicial Conference of the Fourth Circuit, which brought together federal judges and lawyers of the States of Maryland, North Carolina, South Carolina, Virginia, and West Virginia, was held at Asheville, North Carolina, on June 12, 13 and 14. The Conference was presided over by Senior Circuit Judge John J. Parker. As usual, the social features as well as the official program made it successful.

The first day of the Conference was given over to an executive session of the federal judges. On the second day, the open meeting was addressed by Herschel V. Johnson, of the North Carolina Bar (32 A.B.A.J. 426), United States Alternate Member of the United Nations Se-

curity Council; John F. Sonnett, Assistant to the Attorney General, who spoke on the Supreme Court; and Carl McFarland, of Washington, whose topic was the Administrative Procedure Act, which was further discussed by a panel of lawyers at the afternoon session. There was also a full-scale discussion of the Federal Tort Claims Act, led by Judge Ben Moore of the Southern District of West Virginia, and participated in by half a dozen members of the Bar. This is reported elsewhere in this issue.

Judge William E. Baker of the Northern District of West Virginia spoke on the punishment of juvenile offenders. A memorial to Judge Isaac M. Meekins was read by Judge Johnson J. Hayes of the Middle District of North Carolina. Claud N. Sapp, late United States Attorney for the Eastern District of South Carolina, was memorialized by C. T. Graydon of Columbia.

Bills pending before the Congress recommending uniform qualifications for jurors in the federal Courts and improving the system of their selection were unanimously approved. The judges of the Circuit voted unanimously against any change in the present "diversity of citizenship" jurisdiction of the federal Courts. Banquet speakers included Judge Harry E. Watkins, Herbert F. Seawell, and Governor Thurmond of South Carolina.

Seventh Circuit Acts on Pending Legislation

■ The Judicial Conference for the Seventh Circuit, convened in Chicago on June 20 pursuant to 28 USCA §449, was called to order by Circuit Judge Patrick J. Stone. With the exception of Circuit Judge J. Earl Major, absent because of the serious illness of a brother, all of the judges of the Circuit were present.

For the purpose of considering the state of the business of the Courts and advising ways and means of improving the administration of justice within the Circuit, a committee, consisting of Judges Stone, Duffy and Kerner designated topics to be discussed.

Judge Stone expressed his regrets that the Conference was not held at Minocqua, Wisconsin, as voted at the Conference held last December 6.

Senior Circuit Judge Evan A. Evans explained that he had been advised by Director Henry P. Chandler, of the Administrative Office of the United States Courts, that funds for travel had been practically exhausted and that unless strict care was exercised there would be a deficiency in the appropriation for traveling expenses of the Courts for the year. Since 28 USCA §449 empowers the Senior Circuit Judge to designate the time and place of the annual Conference, he had called the Conference to convene in Chicago.

Judge Evans reported in detail on the special convocation of the Conference of the Senior Circuit Judges, held in Washington in April (see our June issue, page 571). He said that the principal matters discussed were as to the Referees—the designating of the needed number of Referees and fixing their salaries. He reported also on the proposed "jury bills." From the Secretary of the Conference, Judge Otto Kerner, we learn that Judge Evans gave also his impression of the present Chief Justice of the United States, and was of the opinion that Chief Justice Vinson has a broad grasp of the problems confronting the Courts and takes an interest in all things concerning the Courts, and that his masterful handling of these matters cannot fail to enhance the value of the Supreme Court. After expressing the high regard which he holds for all of the former Chief Justices whom he has met during his many Conferences and meetings, Judge Evans concluded by saying that in his opinion Chief Justice Vinson will rate with the best of them.

Director Chandler was next called upon to discuss the trends as to the legislation sponsored by the Conference of Senior Circuit Judges, as well as the present status of appropriations for judges' secretaries and law clerks in 1948, and other subjects of interest to the Conference in his usual efficient and informative manner. He spoke about problems as to Court reporters, the closing of some offices of Clerks of District Courts, and the present status of the "jury bills," and placed special emphasis on the need for a closer understanding between members of the Congress and the federal judges. He urged the judges to make economies wherever possible. Director Chandler invited questions and many were propounded. Judge Stone thanked the Director and conveyed to him the appreciation of the members of the Conference.

The Circuit Judges then invited the members of the Conference to luncheon, and the Conference recessed to accept this agreeable hospitality.

The first subject discussed in the afternoon was the proposed *habeas corpus* bills (Report of Judge Parker's Committee). Judge Evans opened the discussion, and was followed by Judges Lindley, Sparks, Holly, Duffy, Barnes and Shaw. The consensus seemed to be that as a whole the bills are constructive and contain much that is good, but that the Conference ought not to approve the bills as now drawn. Objections were voiced as to the requirement of a three-judge Court; several of the judges indicated their objections to requiring a Circuit Judge of Appeals to act on petitions filed before individual judges. After the discussion, Judge Duffy moved that while the Conference, in principle, is in favor of the bills, it is opposed to the idea of a three-judge Court. The motion was put to a vote and carried.

In a motion by Judge Evans, the Conference voted that it was in favor of amending 28 USCA §452 by striking from that section the words "and the several Judges of the Circuit Courts of Appeal" and "A Circuit Judge shall have the same power to grant writs of *habeas corpus* within his Circuit that a District Judge has within his district; and the order of

the Circuit Judge shall be entered in the records of the District Court of the district wherein the restraint complained of is had."

The Conference next considered the three jury bills now pending in the Congress. S. 17 (H. R. 944) would revise and strengthen the present law regarding jury commissioners. It provides that their compensation shall be increased in accordance with the added duties assigned to them. S. 18, the most important of the three bills, provides uniform qualifications for jurors in the federal Courts and would make women eligible for jury service in all States. S. 19 (H. R. 947) would give jurors a more adequate reimbursement for their costs of travel and subsistence. After discussion, Judge Barnes moved that the bills be approved by the Conference. This was carried.

The next subject considered was the proposed amendment of Section 64 (b) of the Bankruptcy Act, now pending in Congress. Judge Duffy moved that the amendment be approved and recommended for passage. The motion carried.

The Conference discussed the new Rules of Criminal Procedure, and several of the District Judges told of their experience with the Rules. The consensus was that the Rules are working satisfactorily.

The matter last discussed was the possibility and desirability of changing some boundaries of judicial districts within the Circuit. Judge Evans asked that each District Judge write to him before September 20 concerning any desirable change in the present boundaries.

The chairman was authorized to appoint a committee to plan a program for the next annual meeting of the Circuit Conference. Judge Stone named Judges Igoe, Minton, Swygert, and Duffy.

"Splendid Performance" Yet "Only a Beginning"

Editorial in the Miami Herald *for May 5:*

The fine praise given the Dade County Bar Association by President Carl B. Rix of the American Bar Association for its recent condemnation of lax law enforcement was well merited and without extravagance.

The Dade Bar frankly and categorically condemned criminal conditions existing in this county. In a report prepared by a special committee headed by Attorney Robert H. Givens, Jr., the Association condemned the wholesale breakdown of law in Dade County and charged responsible officials with bringing in thereby a criminal element from all parts of the country. . . .

The people of this community were encouraged by the bold and forthright stand taken by the Bar Association. It was a leadership that was new. It was, nevertheless, a natural leadership.

Where could a community—shocked by the prevalence of entrenched vice, of seeming corruption and frustrated by abortive efforts to restore the good name of the community through enforcement of the law—turn more naturally for aid than to the profession whose business is with the courts and whose livelihood is in the practice of the law?

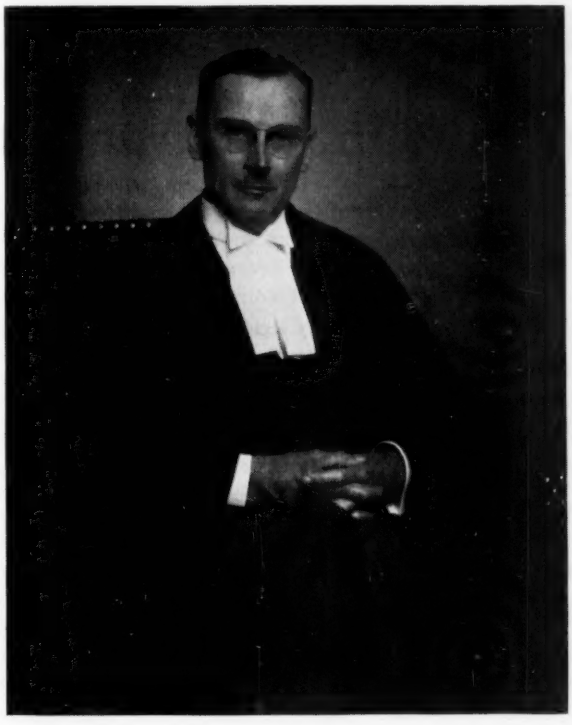
It was, as Mr. Rix phrased it, a "splendid performance." But it was only a beginning. The Bar Association must not now rest on its laurels. It has spoken clearly. It has pointed to the evil. It has put its finger on the cause. . . .

The implications for the Bar Association in Mr. Rix' praise are of immediate pertinence:

"You can't have good courts in corrupt cities and centers of government. That's why I am here today—to give every encouragement to you men who are carrying on for good government in all branches."

The Bar Association has only set its face to the furrow. If we are to have a harvest of community decency instead of the perennial crop of tolerated law-breaking, the profession now must plow, long and deep.

Two American Chief Justices Who Will Attend Cleveland Meeting



JAMES C. McRUER

FRED M. VINSON

Two American Chief Justices who will be honor guests of our Association and address our Annual Meeting in Cleveland this month. Left to right, they are Chief Justice James C. McRuer, of the High Court of the Province of Ontario, Canada, this year's President of the Canadian Bar Association, and Fred M. Vinson, Chief Justice of the United States and former Secretary of the Treasury. A personalized sketch of the distinguished representative of Canada, who speaks on Wednesday afternoon, was in our December, 1946, issue (page 890), in connection with his cooperation, as Vice Chairman of his Association's distinguished Committee on the Bases of Peace, with our Association's Committee for Peace and Law Through United Nations. Those who have worked with "Jim" McRuer will lead in giving him a warm welcome to Cleveland. The judicial services of Chief Justice Vinson are portrayed in virtually every issue of the *Journal*, and a sketch of his career was in our July, 1946, issue (page 387). American lawyers, irrespective of party, will be honored to meet and greet him, and will await with interest his address on the evening of September 22.

Never-Ending Struggle for Law and Justice

"The struggle for peace is the struggle for law and justice. It is a never-ending struggle. Law and justice can be developed and applied only through living institutions capable of life and growth. And the institutions must be backed by sufficient force to protect nations which abide by law against nations which violate the law . . . History informs us that individuals abandoned private wars and gave up their arms only as they were protected by the common law of their tribe and their nation. So I believe that in the long run international peace depends upon our ability to develop a common law of nations which all nations can accept and which no nation can violate with impunity . . ."

—James F. Byrnes, of the District of Columbia Bar, when Secretary of State, before the Cleveland Institute of World Affairs.

6

International Legislation:

Prize-Winning Ross Essay as to Its Improvement

by **William Tucker Dean, Jr.** • of the District of Columbia and Kansas Bars

■ It was announced in our July issue (page 665) that the 1947 Ross Essay Prize had been awarded to William Tucker Dean, Jr., who in 1946-47 was an Assistant Professor of Law at the University of Kansas Law School and will hold a like position this fall at the New York University School of Law. The subject for the 1947 competition for the $2500 prize placed at the disposal of our Association by virtue of the will of the late Judge Erskine M. Ross, of Los Angeles, Judge of the United States Circuit Court of Appeals for the Ninth Circuit was:

"How Can International Legislation Best Be Improved—By Multipartite Treaties, or by Giving Powers to the General Assembly of the United Nations".

We publish below, in full and as written, the essay which was selected for the prize by United States Circuit Judge Harvey M. Johnsen, of the Eighth Circuit, Charles E. Dunbar, Jr., of New Orleans, and George A. Finch, of Washington, D. C., as the Committee of Award, whose selection was confirmed by the Board of Governors. "Honorable mention" was given to the essay submitted by Schuyler Wood Jackson, of Topeka, Kansas, which we will publish when space permits.

■ International legislation is a challenging term that evokes in its two words the whole glorious, desperate struggle for a world under law, for a legislative regulation of the conflicting interests of what are still sovereign, national states. Used as early as 1901 by John Bassett Moore,[1] the term international legislation[2] has survived the criticism and ridicule of cynics and purists and with the publication in 1931 of the first four volumes of Judge Manley O. Hudson's great compilation, *International Legislation*,[3] the term has become accepted unmistakably as a bold and vivid description of both ". . . the process by which changes are made in international law through lawmaking treaties or conventions and . . . the results of that process which have been embodied in the content of international law."[4]

International legislation is not, of course, identical in kind with national legislation, differing with the latter only in its greater geographical scope.

> . . . The term "international legislation" is a metaphor; . . . the essence of "legislation" is that it binds all persons subject to the jurisdiction of the body legislating, whether they assent to it or not, whether their duly appointed representatives have assented to it or not. International legislation does not. It only binds parties who have duly signed the lawmaking treaty and, where necessary, as it usually is, have ratified it.[5]

In what respects international legislation differs from legislation of national states will appear more fully after an examination of international legislation presently in force and some discussion of their different origins.

Legislative in its origin and distinctly so in its pervading effect, the Charter of the United Nations is perhaps more accurately an instrument of international constitutional law, the International Constitution. The remaining area of international legislation may be divided into two parts, one large and growing and one dangerously small. The first of these consists of international legislation relating to essentially non-political relations between nations, such as postal matters, rules of navigation and sanitary conventions, and also of international legislation in the field

1. "The nineteenth century is, however, specially distinguished for the modification and improvement of international law by what may be called acts of international legislation." Moore, *Progress of International Law in the Century, The Nineteenth Century* (New York: 1901) reprinted in 2 Moore, *Collected Papers* 439, at 445 (New Haven: Yale University Press, 1944).

2. According to the limited, traditional view, ". . . legislation expresses a relationship between *man and State* . . . it cannot exist until the notion of a central State, whether or not it be 'sovereign' in the sense understood today, has crystallized . . ." Allen, *Law in the Making* 249 (2d ed. Oxford: Clarendon Press, 1930).

3. *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations*, vols. I-IV (Hudson ed. Washington: Carnegie Endowment for International Peace, 1931).

4. Hudson, "International Legislation:" in 8 *Ency. Soc. Sci.* 175. See also Dunn, "International Legislation" 42 *Pol. Sci. Q.* 571 (1927).

5. McNair, "International Legislation" 19 *Iowa L. Rev.* 177, at 178 (1934).

of private international law, of which conventions on international shipping documents, maritime collisions and salvage are examples. All such legislation will be described for convenience as *non-political international legislation,* although it is recognized that under special circumstances essentially non-political relations between nations may take on a political character because of outside stresses. An example of this development would be presented by the refusal of one nation to exchange mail with another as a result of preexisting tension over national boundaries.

The second category of international legislation is that which is unmistakably political in nature, such as treaties of alliance and peace, boundary agreements, conventions for disarmament and conventions enjoining gas and bacteriological warfare. International legislation of this character will be referred to as *political international legislation.* An important distinction between political and non-political international legislation is that although nations and individuals may differ sharply in both fields, differences over the subject matter of political legislation are by far the keenest and, involving as they usually do such concepts as "national honor" and "national existence", present by far the greater impetus to war. The significance of the distinction drawn between non-political and political legislation is highly important in answering the question which forms the subject of this paper and it underlies all the ensuing discussion.[6]

Improvement of International Legislation

Before turning to techniques for the improvement of international legislation, however, it will be helpful to examine international legislation in terms of its end and purpose. A world polity, which is to say a world society under law, will need at least three instruments to maintain itself; not merely an international legislative authority will be required but an international executive to administer and execute the legislative enactments and an international judiciary to interpret the legislation and perform other judicial functions. To expect a perfected world polity to arise upon the passage of international legislation is to expect a man without legs to walk when offered a cane.

Fortunately for the world these two corollary means toward the end of a world under law are not entirely lacking. The International Court of Justice is a rudimentary world court, limited severely in its jurisdiction, however, by its Statute and by reservations of the acceding nations, including the United States. The necessary international executive is in existence in a pitifully weak form, the Security Council of the United Nations, an "executive" so lacking, however, in the requisite characteristics of an executive agency as scarcely to be recognizable as such.

The improvement of international legislation will mean progress toward the end of world law only insofar as such improvement is matched in the areas of the international executive and the international judiciary. The international executive must become strong enough and properly organized to administer the international legislative policies which are not self-executing, and the international judiciary may well have to take over appellate functions in relation to national courts on matters arising directly out of international legislation for which some degree of uniform interpretation is necessary.

The specific improvements needed in international legislation may be conveniently discussed separately for non-political and political international legislation. Improvements in the Charter of the United Nations, urgent and interesting as they are, lie beyond the scope of this paper.

Whether the International Convention for the Protection of Submarine Cables or the Convention on the International Regime of Railways, to take two random examples, should be amended or repealed in favor of entirely new instruments or otherwise altered must be decided primarily by technicians and attorneys experienced in the fields of communications and transportation,[7] and so for all of the specialized instruments of non-political international legislation. What can, however, be seen at once is the necessity for vastly expanding the scope of such legislation over the many fields of international relations where no legislation exists or where it is only imperfectly formed, as in the case of numerous conventions long since signed but not yet widely ratified. An exhaustive list[8] of such fields would be a long and difficult task, and it will be enough to suggest a few: Maritime liens and mortgages, family relations and the whole law of persons, sales and conflict of national laws. Whether the coverage of non-political international legislation can be extended by multipartite treaties amending current legislation and entering new fields or by giving powers to the General Assembly of the United Nations thus becomes the question which will be dealt with below.

Political international legislation, aside from peace treaties, would scarcely fill a slender volume. The General Act for the Pacific Settlement of International Disputes of 1928, known as the Kellogg Pact, the Convention for the Amelioration of

6. See Dunn, "The Practice and Procedure of International Conferences" 36 (Baltimore: *Johns Hopkins University Studies in Historical and Political Science,* New Series, No. 6, Johns Hopkins Press, 1929): "1. The relations between the states of the world *as political units.* These include such matters as alliances, boundaries, territorial sovereignty, war and peace, arbitration, neutrality, codification of international law, and, in general, any transactions relating to the character of the state as an international person.

"2. The regulation of international activities, transactions, and interest of *individuals* extending beyond national boundaries. These include such matters as international commerce, international land and water transportation, postal, telegraph, and radio communication, public health, labor, agriculture, and a number of other activities and transactions of the people at large now carried out on an international basis.

"Activities of the first type may be called 'political' and those of the second type 'non-political.' "

7. For an example of the technical studies available, see Pollaczek, "International Legislation in the Field of Transportation 38 *Am. J. Int'l L.* 577, esp. 595-600 (1944).

8. A list still very useful will be found in the *Report of the Committee of Experts appointed by* the League of Nations for the progressive codification of international law. See Supp., 20 *Am. J. Int'l L.* 204 (Special Number, 1926).

the Condition of the Wounded in Armies in the Field, the various peace treaties and boundary agreements, old and new, and not a great many more would complete the list of fully operative instruments of political international legislation. As against this meager collection the need for legislation to regulate the political aspects of relations between nations is urgent. Civilization itself depends upon the promulgation of legislation for the international control of atomic energy; peaceful changes in international political and economic relations require implementing legislation if the rigidity of peace treaties is not to be dissolved by warfare. On a host of topics the relations between nations need legislative attention. And so for political as well as non-political international legislation improvement is to be sought in extending greatly the scope of such enactments.

Multipartite Treaties

The preparation of international legislation by means of multipartite treaties is the only technique which has been used up to this time to any material extent. The process has been broken down by one authority into three parts:

> The first of these stages consists in the preliminary study of the relevant rules of law on a comparative basis for the purpose of discovering not only the extent to which these rules are divergent but also how far the divergences are fundamental when viewed against the background of legal procedure and business practice in which the rules are called upon to function. The second stage is constructive and takes the form of the utilization of the results of this comparison for the purpose of formulating proposals for unification. The third and final stage is that of the negotiation under diplomatic auspices of terms which can be embodied in an international convention and thus brings unified law into being.[9]

Such treaties were not drafted by permanent legislative assemblies. The Assembly of the League of Nations was no more of a legislative body than is the General Assembly of the United Nations, and its legislative activity was limited to measures determining the internal organization of the League, such as the League budget.[10] Nor has the International Labor Conference ever possessed anything like comprehensive legislative authority. The host of instruments of international legislation[11] from the Vienna Protocol of 1815 on diplomatic agents, generally accepted as the first such instrument in the Nineteenth Century, to the most recent international conventions were agreed upon by international conferences; all instruments had to be submitted to the participating governments for ratification, a step which by no means was always taken.

Judge Manley O. Hudson places the beginning of the modern legislative movement in international law in 1864 and states:

> Since that time, the number of collective treatises has grown very large, and they deal with a variety of interests which were not only protected by the customary law but which were wholly unforeseen when its foundations were being laid . . . the War of 1914-1918 seems to mark the end of one era and the beginning of another. The fifty years preceding this war were marked by a previously unparalleled international activity . . . The establishment of the League of Nations, including the International Labor Organization, meant a great quickening of the legislative process . . . the decade which began in 1919 saw the frequent assembling of international conferences at which numerous multipartite instruments were opened for signature.[12]

International conferences continued to flourish in the 'Thirties despite the imminence of World War II.[13] What was accomplished over the Nineteenth and early Twentieth Centuries was chiefly accomplished in non-political international legislation, as already suggested, so that it might be said that the technique of multipartite treaties for arriving at non-political international legislation had been successfully tested and found useful, if slow.

The progress made in political international legislation through the multipartite treaty device has been far less impressive than that of non-political international legislation. The treaties of peace which have followed wars are the most numerous of the instruments of public international legislation, and the major example, the Treaty of Versailles after World War I, was a conspicuous failure. The Kellogg Pact, does not seem to have been taken seriously by any of the signatory states at any time. Is it likely, then, that a better performance is to be expected by a continuation of the multipartite treaty device as against giving powers to the General Assembly of the United Nations? For an answer it will be necessary to analyze very closely this alternative method for both types of international legislation.

The General Assembly of The United Nations

> Till the war-drum throbb'd no longer. and the battleflags were furl'd
> In the Parliament of man, the Federation of the world.[14]

Tennyson's lines have thundered down the dark decades since he wrote them in 1886 and they fittingly epitomize the ideal of a world under law in the parliamentary pattern.

No such parliament of man has been achieved even though the United Nations and its predecessor, the League of Nations, represent the nearest approach to a world feder-

9. Gutteridge, "The Technique of the Unification of Private Law" 20 *Brit. Y. B. Int'l L.* 42 (1939).

10. McNair, *op. cit. supra* note 5, at 186 note 14: "To describe the Assembly of the League of Nations as an international legislature would be misleading."

11. See 1 *International Legislation: A Collection of the Texts of Multipartite Instruments of General Interest Beginning with the Covenant of the League of Nations* xxix (Hudson ed. Washington: Carnegie Endowment for International Peace, 1931) for a list of multipartite international instruments from 1864-1914. Vols. 2-7, *id.* contain instruments agreed upon since 1914.

12. *International Legislation, supra.*, xviii, xix, xxxvi. Professor Reinsch observed as early as 1911 in respect to multipartite treaties: ". . . When the entire field of international legislation is surveyed, it is surprising what substantial bodies of law have already been created by such common agreement." Reinsch, *Public International Unions, Their Work and Organization* 159 (2d ed. Boston: World Peace Foundation, 1916).

13. All of volumes 6 and 7 and part of volume 5 of *International Legislation, op. cit. supra* note 12 are devoted to instruments which became subject to ratification between 1930 and 1937. *Id.* vol. 5, 1929-1931 (1936); vol. 6, 1932-1934 (1937) and vol. 7, 1935-1937 (1941).

14. Tennyson, *Locksley Hall, Sixty Years After* (1886).

ation which has yet been seen. The degree of correspondence that obtains between the General Assembly of the United Nations and legislative bodies in national states does, however, invite the question as to whether the General Assembly is so like a legislative body that granting additional powers to it will transform it into a genuine legislature to which the world may look with confidence for improvements in international legislation. Precisely what additional powers might be given is beyond the scope of this study; numerous writers and energetic organizations have proposed changes in the Charter whereby the General Assembly would receive the power to arrive at decisions binding on all members of the United Nations by some variety of a vote, whether a majority, two-thirds or some other fraction, or a combination of several votes. Other schemes were propounded before the organization of the United Nations. Some proponents of such plans have further urged changes in the constitution of the Assembly so that, rather than allowing each Member nation one vote, an allocation of voting power in terms of population, resources and other determinants of Great Power strength would give the larger nations a control more comparable to that they exert in the Security Council.[15]

It is believed, however, that the question at hand, the improvement of international legislation by giving powers to the General Assembly of the United Nations, can be decided without defining such powers beyond describing their operation as designed to bind Members, large as well as small, regardless of the consent of the individual state. Although even under the present Charter smaller Member states not represented on the Security Council may be bound by a vote in the Council,[16] none of the Big Five can be so bound without their respective concurring votes. Non-political international enactments of the General Assembly under such powers would be legislation without the necessity of ratification or concurrence by any national state and in fact would be binding even though some state might indicate its dissatisfaction over the legislation.

The effect of granting powers to the General Assembly in the field of non-political international legislation might well prove to be startling. Surrounded by numerous specialized agencies affiliated with the United Nations and cooperating with a wide variety of private and semi-public international organizations, the General Assembly has at hand ample sources of advice and information on even the most technical aspects of non-political international legislation. If, for example, the General Assembly decided to consider legislation on workers who cross national borders at certain seasons to do agricultural labor, the technical resources of the Economic and Social Council, its subsidiary Food and Agriculture Organization, the International Labor Organization, the International Trade Organization, and such cooperating agencies as the World Federation of Trade Unions and International Chamber of Commerce would be readily available. Questions concerning foreign exchange which such migratory workers could take back to their respective countries might be discussed with the officials of the International Monetary Fund, and the International Bank might be consulted in connection with financing movements of workers. If an area under trusteeship were concerned, the Trusteeship Council would be consulted. Cultural aspects of any large scale seasonal migration would be taken up with the United Educational, Scientific, Cultural Organization. It can be seen at once that the General Assembly could well become a focal point for concentrating knowledge and skill and applying them to the improvement of non-political international legislation.

The Assembly of the League of Nations did, on some occasions, act as the agency for the signature and ratification of legislative instruments: the Slavery Convention of 1926, the General Act for the Pacific Settlement of International Disputes of 1928 and the Convention for the Regulation of Whaling of 1931 are examples of instruments so processed.[17] Even under the present Charter of the United Nations the General Assembly is directed to

> . . . initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.[18]

Work is already well under way under this provision at the direction of the General Assembly,[19] and the American Bar is actively cooperating.[20]

To give the General Assembly powers over non-political international legislation should expedite tremendously the progress made over the last hundred years. Although action in this field by a body such as the General Assembly is utterly new, action in respect to non-political international legislation is a well established tradition. Nations and interested individuals are accustomed to cooperation in these fields; their residents who deal with residents of other countries have done so under international legislation on some matters and have suffered from the lack of international legislation on others.

(Continued on page 962)

15. ". . . The key to the problem of world peace lies mainly in the establishment of an international legislative body representing the various national states and allowing to each a voting power bearing some reasonable relation to its population and status: a body which will be able to reach decisions in a business-like way through use of a reasonable system of majority voting, and to which the national states will by agreement concede the sovereign power of control over such matters of international relationship as it may be necessary from time to time to regulate internationally in the interests of peace." Keen, "International Legislation" 27 *J. Soc'y Comp. Leg.* (3d ser.) 78 (1945). See also Goodrich, "The Amount of World Organization Necessary and Possible" 55 *Yale L. J.* 950 at 957 *et seq.* (1946) and Sohn, "Multiple Representation in International Assemblies," 40 *Am. J. Int'l L.* 71 (1946).

16. U. N. Charter Art. 25: "The members . . . agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

17. Hudson, "International Legislation" in 8 *Ency. Soc. Sci.* 176-177.

18. U. N. Charter Art. 13, Sec. 1.

19. Hudson, "Encouragement of the Development of International Law by the United Nations" 41 *Am. J. Int'l L.* 104 (1947).

20. See, for example, "International Laws Plans Are Made to Aid Its Development" 33 *A.B.A.J.* 236 (1947) and "International Law: Regional Group Conferences Begun in Boston" 33 *A.B.A.J.* 336 (1947).

7

Chief Justice Bleckley:

Illustrious Member of Georgia's Supreme Court

by **S. Price Gilbert** • of the Georgia Bar (Atlanta)

■ One of the functions of the *Journal*, in the opinion of its Board of Editors, is to obtain and publish portrayals of the personalities, characteristics and careers of great American lawyers and judges, of the generations that have lately passed. It has seemed to be imperative that these sketches should be obtained from men who knew these illustrious personages, saw them in action, and formed lasting impressions as to the qualities which made them great.

In this series we are privileged to offer this month a sketch of the jurist who was an outstanding and beloved figure as Chief Justice of the State of Georgia. Writing in the serenity and wisdom of his eighty-sixth year, S. Price Gilbert, of Atlanta, a former member of the Court, enables us to give to our readers his personal recollections of Chief Justice Bleckley.

■ The subject of this sketch was a truly great man. Though his fame rests chiefly on his career as Chief Justice of the Supreme Court of Georgia, the real base of his greatness was much broader.

In a volume of more than three hundred printed pages, the Georgia Bar Association published in 1900 a *Memorial of Logan E. Bleckley*. It was prepared by a special committee and read by Joseph R. Lamar, a Justice of the Supreme Court of Georgia from 1902 to 1905, and an Associate Justice of the Supreme Court of the United States from 1910 to 1916. The first sentences were, "Jurist, philosopher, mathematician, poet. A colossal and unique figure".[1] It may be presumptuous to suggest any amendment to the first sentence, yet it seems that certainly the word "logician" should be added, for logic abounds in all that the Chief Justice wrote. It was much a part, an integral part, of his mental structure.

He was born in the mountains of Rabun County, Georgia, in 1827. He was a self-made man. He owed little to any pedagogue—even the name of the teacher of the primitive mountain school where he attended for a few months is forgotten. At the age of eleven he became the assistant of his father, who was Clerk of the Circuit Court in the county of Rabun. There he began to read any of the law books that he chanced to discover, such as the Acts of the Legislature; and soon the "Law" became his mistress, and that devotion continued throughout his life. During his nineteenth year he was admitted to the Bar. For the first two years his practice yielded less than fifty dollars per annum.

He was a typical mountaineer, six feet, five inches tall, slightly stooped shouldered; and, as I knew him, he wore his hair nearly to his shoulders and his full beard to his breast. Though sickly in youth, he lived to the ripe old age of eighty years. He was at all times and in all places *sui generis*—absolutely unpretentious, genuine, kindly and friendly. He was incapable of over self-praise. He could truly value his own works. More than once remittances came to him for payment for professional works, that he deemed overpayments. In such cases he returned them with the statement that he knew the value of his services and that he would only accept the lesser sums named by him. There was a distinct nobility of character, of purity and gentleness that commanded at all times and of all persons ungrudged respect and confidence.

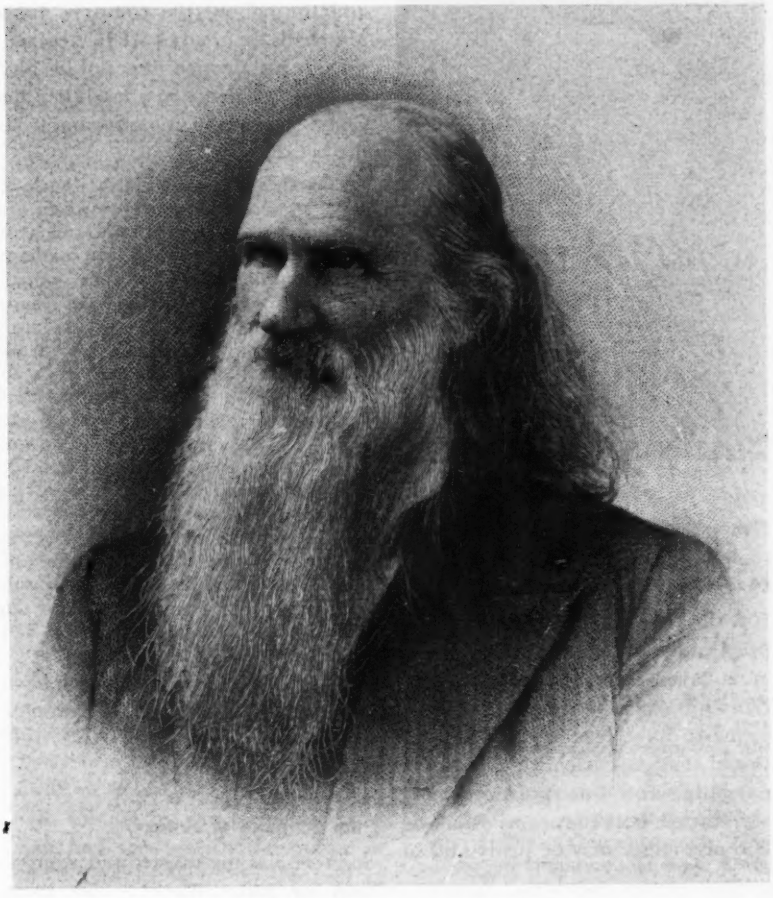
He Would Accept Only Judicial Office

Bleckley could have had, I dare say, any public office in the gift of Georgians, by indicating a willingness to serve; but he would accept none other than judicial. Except for a brief term as Solicitor General, and three years, 1864-7, as Reporter of the Supreme Court, his entire official experience was on the Supreme Court of Georgia, 1875-1879 and 1887-1894.

On one occasion, when a Demo-

1. *Note by the Author:* I make no apology for the free and frequent use of quotation marks. It is my conviction, practised throughout my service on the Georgia Supreme Court, that it is better to quote, in referring to opinions and rulings previously rendered, rather than to try to express the same principles in my own words. The other practice leads to a gradual, though perhaps an unintentional, varying of the law. Really it is Chief Justice Bleckley whom I'm endeavoring to picture.

ratic convention was deadlocked on a nomination, for Governor of Georgia, a committee waited on Judge Bleckley, offering him the nomination. The nomination was equivalent to election. In response to his questions, he was assured that he would undoubtledly receive the nomination, if acceptable; that he was satisfactory to the convention in every particular. He replied: "Then, gentlemen, I will not accept the nomination, since my nomination only awaits my acceptance, and I'm considered capable. I could gain nothing more by accepting and serving as Governor."



CHIEF JUSTICE LOGAN E. BLECKLEY

Nestor of the Georgia Bar and An Ideal Jurist

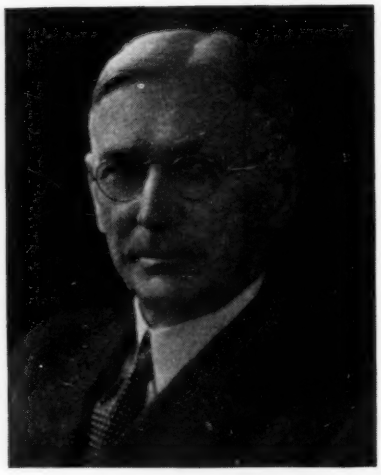
From 1888 to his death this writer knew him personally, loved, and revered him as the Nestor of the Georgia Bar, and the ideal jurist. A common expression of Georgia lawyers was that he had the mental grasp to so state the law and the facts of a case as to make the most complicated issues clear and simple. His power of analysis and logic unerringly produced the correct result. Grover Cleveland said that the late L.Q.C. Lamar could not decide a question wrong. I venture to say the same for Chief Justice Bleckley.

When Socrates was condemned to death, a friend said to him that it was terrible to be unjustly condemned. Socrates replied: "It would be terrible if justly condemned". Bleckley is reported to have said (in some casual way) that the only protection afforded to any one is that for any penal offense he is entitled to be tried according to due process of law. Therefore, if accorded that protection, he has no complaint against the state, even if unjustly convicted. Of course, due process of law includes the right to complain of all errors deemed to have been committed in the trial Court and to have a review by the Court of last resort. That is due process.

Concerning the Author: Stirling Price Gilbert was born in Stewart County, Georgia, on January 31, 1862, and was graduated from Vanderbilt University (B.S.) in 1883 and from Yale (LL.B.) in 1885. He began the practice of law in Atlanta in 1885 but removed to Columbus, Georgia, the next year. He was a member of the Georgia House of Representatives 1888-93, Solicitor-General of the State 1893-1908, Judge of the Superior Court 1908-1916, and a Justice of the Supreme Court of the State from 1916 to 1937, when he retired. By appointment of the Court in 1929 he was Chairman of the Commission to Revise the Code of Georgia. He was reappointed by a legislative resolution in 1933, and the Revised Code was adopted as statute law effective January 1, 1935. In 1943 he was appointed by the Governor as a member of the Board of Regents for the University System of Georgia for a term to expire in 1950. As such he has taken the greatest interest in the educational system of the State.

Mr. Gilbert was a Captain in the Georgia National Guard 1887-93 and a member of the State Military Advisory Commission from 1890 to 1893, when he resigned. He is a life member of the American Law Institute and an honorary life member of the Georgia Bar Association.

In 1946 he wrote his autobiography under the title *A Georgia Lawyer*, (University of Georgia Press), which was reviewed at length in our January 1947 issue (page 49). This is one of the most delightful and worth-while books of its kind in recent years. Most of our members would enjoy reading its reminiscences and its virile opinions, in connection with the author's present article.



S. PRICE GILBERT

His Lofty Concept of the Judicial Function

Bleckley had read and really knew practically all of the books of the great law writers, and also of logicians and metaphysicians. Indeed he seems to have read everything that would tend to enrich his mind. He not only wrote but spoke on many and varied occasions, and what he said of another may be justly said of him:

> His mind was a crystal; it was clear as a sunbeam. What he saw, he saw with distinct vision, and what he said, was said in clear, concise and elegant language.

He might properly have been called "The Just", as was Aristides. As a great jurist he was another Coke, but without the blemishes of character that Coke earned in other theaters of public service.

He was another John Marshall, serving in a smaller field, at a less crucial period of American history. Marshall justly earned his crowning glory in the field of constitutional law in the uncharted field of our adolescent federal Union. Marshall possessed the dignity and bearing so characteristic of the just judge that he was always respected as such; this was true even on the most informal occasions. The same was true of Bleckley.

Throughout the trial of Aaron Burr for treason there was intense excitement surrounding the Court and throughout the country. John Marshall, the great Chief Justice, presided. He thrilled the public and assured confidence in himself and his Court by calmly announcing from the bench:

> Much has been said in the course of the argument on points on which the Court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice.
>
> That this Court dares not usurp power is most true.
>
> That this Court dares not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

Chief Justice Bleckley would have used similar words and with similar effect.

To Him Law Was "the Scripture of Justice"

So great was the respect and admiration for Judge Bleckley that there was never the suggestion of opposition to him during his entire service on the Georgia Supreme Court. Twice he resigned. On the first occasion, worn from incessant labor, he placed his resignation in a letter to the Governor: "First, I am not sufficiently learned in the law to be qualified on a large and liberal scale for judicial functions. . . . Second, my health threatens to fail unless I change my mode of life". The Governor wisely and in accord with public opinion regretfully accepted his resignation, "based solely" on the ground of failing health. He added the further words: "I must beg to dissent from your modest estimate of your qualifications and to assure you that I would not feel justified in accepting your resignation based alone on that ground." Some years later he was appointed Chief Justice, and served until advancing age caused him again to resign.

The Great Seal of Georgia has an arch on which is the word "Constitution". This is supported by three pillars or columns, on which are the words "Wisdom", "Justice", "Moderation". These words might well be said to have been Bleckley's constant guide. His definition of "Wisdom" was: ". . . It is knowledge and virtue combined; the two together constitute wisdom. Knowledge is its light, virtue is its heat, just as bright rays and warm rays mingle in the sunbeam. Knowledge alone is too cold, virtue alone is too dim. To be wise we must discern truth and love duty." (*Memorial,* page 111).

He said: "Law is the scripture of Justice, the gospel of right, and Truth is the Minister at the Altars. Error is a pretender to holy orders, a wolf in sheep's clothing, always striving to usurp the sacred office, or to share in the exercise of its functions."

His Stirring Plea to Lawyers to Help Suppress Mob Violence

In an address entitled "Emotional Justice", which was a discussion of mob violence, he said:

> Justice is nothing if not indifferent and impartial. All the passions, when aroused, are unfriendly to it; they are all respecters of persons; the benevolent passions incline us to favoritism, the malevolent to a blind antagonism. To be indifferent means to be free, not only from prejudice, but from the influence of active emotions; for active emotions sway the mind in this or that direction, and justice is so essentially rational that nothing but the dictates of reason can be heeded in rightly dealing with it. It is purely intellectual, and in no degree emotional. Abnormal emotion is always a disturber. Even righteous indignation and holy horror are impertinent intruders in an affair of justice.
>
> Emotional justice has no standing in the forum of right reason, and ought to have none anywhere. It should be so effectually overruled and discredited as to leave it without favor in public opinion or in private judgment. I exhort and adjure all good citizens to co-operate with the Executive and the Judiciary in staying quickly that violent justice which is administered by mobs—that wild and lawless justice which is rife in our unhappy country! Children already born may live to see mobs mobbed; large mobs

may execute smaller ones; mobs of one race may rise up against mobs of another race; mobs of bad men may become as numerous and more terrible than mobs of good men; brute force, through a long and bloody period of disorder, may reign supreme!

This address was delivered before the annual meeting of the Georgia Bar Association, and was an especial appeal to lawyers to lend their every effort and influence to a suppression of mob violence.

"Truth" Was the Most Frequent Subject of His Addresses

He delivered many addresses. Truth was his most frequent subject—"Truth at the Bar", "Truth in Thought and Emotion", "Truth in Conduct". The last-named was delivered at the University of Georgia. His addresses were usually lightened and adorned by flashes of humor. In "Truth in Conduct" he said, in part: "I assume that truth is an acceptable subject, if not a familiar one, at a university". Embarrassed by the eulogistic introduction and warm reception, he said: ". . . I always bring myself before my audience—if I have any. Very often I have none . . . my habit is to talk about myself as freely as about other people, and quite as favorably; if any difference, more so". (*Memorial,* page 185)

In "Truth at the Bar", delivered before the Georgia Bar Association, he said, in part: "False suggestions of fact can have no more toleration at the Bar than elsewhere, . . . and truth of law is not less essential or less sacred. To fabricate law and utter it as genuine, knowing it to be forged, is quite as reprehensible as to invent fact".

Doubtless he found gratifying agreement in the words of Emerson: "Truth is the summit of being; Justice is the application of it to affairs . . . Justice must prevail, and it is the privilege of truth to make itself believed".

Wedded irrevocably to Truth and Justice, he inscribed his own memorial upon the hearts of Georgians, lawyers and laity alike. "Where principle was involved he was uncompromising." (*Memorial,* page 24).

What has been quoted from Judge Bleckley constitutes a mere bird's-eye view of his voluminous expressions, but it is hoped that it is sufficient to evidence his unvarying effort to inform and uplift his fellow man.

A Lively Sense of Humor Cropped Out in His Opinions

Bleckley indulged in no ribald wit or humor. He did have a keen sense of the humorous, that cropped out occasionally quite naturally. As such it adorned and relieved the serious and deeply thoughtful productions that made him famous. Unfortunately those serious, laboriously-thought-out opinions cannot be satisfactorily described by brief quotations. For that reason no attempt is made to do so. He himself considered *Ellison* v. *Georgia Railroad,* 87 Ga. 691, 695, as probably his best opinion. Ranking probably next he regarded *Ewing* v. *Shropshire,* 80 Ga. 241, and *Alabama Railroad* v. *Fulghum,* 87 Ga. 263.

In the *Ellison* case, the chief question had to do with the power of amendment of pleadings. He said, in part,

> Amendment is a resource against waste. In pleading, as in every other art, the philosophy of amendment . . . is comprehended in the frank recognition of two things, both of which are made manifest by actual experience; the first is, that in the practice of any art, it is generally better to preserve what has been done . . . than to throw it away and begin over. . . . The law has all the wisdom and prudence of all trades. When practicable it will conserve its own work, the work of its magistrates and ministers and that of suitors in its Courts, and their counsel.

In a case where the trial judge had rendered a correct judgment but assigned a wrong reason, Judge Bleckley wrote:

> The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.
>
> "The pupil of impulse, it forced him along.
> His conduct still right, with his argument wrong;
> Still aiming at honor, yet fearing to roam,
> The coachman was tipsy, the chariot drove home."

In another case, where the record was voluminous but the amount involved very small, Bleckley took an amusing and lighter vein. "In the ornithology of litigation this case is a tomtit, furnished with a garb of feathers ample enough for a turkey".

Keen Analysis and Logic in His Judicial Opinions

In a criminal case where the accused had been convicted of an "assault with intent to murder", point was raised and argued that there could have been no "intent to murder" because the accused had used a mere walking stick when a loaded pistol was equally available; and that the pistol would have been much more likely to have produced murder, had that been the intent of the accused. Bleckley wrote, in part:

> It is asked why was not the pistol used? or a knife? or a rock? or a heavy club? We suppose assassins, like other mortals, are liable to make mistakes. Men, even when their ends are wise and virtuous, do not always select the best means at their command. There is no presumption that those having foolish and wicked ends in view are either more discreet or more fortunate. It is a great blunder to engage in crime at all, and how many subordinate or secondary blunders may occur in the course of a criminal transaction is a matter of much uncertainty. It is said that there was no dispute and nothing to engender malice . . .

He concluded "But this is to suppose the prisoner was guided by correct reasoning, when the strong probability is that he was guided by false reasoning. He acted like a fool, and it is altogether unlikely that he reasoned like a philosopher. His mind went astray, and who can follow it?"

Here we find the keenest analysis and logic; and these he used as naturally as he breathed.

A Unique Tribute in Verse to "The Bliss of Toil"

At the time of his first resignation from the Court, on account of overwork and impaired health (the Court at that time consisted of three justices, and Bleckley's second resignation caused it to be increased to six),

he wrote and caused the following lines to be spread upon the minutes of the Court:

IN THE MATTER OF REST

Rest for hand and brow and breast,
For fingers, heart, and brain!
Rest and peace! a long release
From labor and from pain;
Pain of doubt, fatigue, despair,
Pain of darkness everywhere
And seeking light in vain.
Peace and rest! are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil;
No bliss but this, from sun and soil,
Does God permit to grow.

America's Inheritance Is Its Great Leaders in Many Generations

Frederic Porcher, in his eulogy (1853) of John C. Calhoun, said: "It is an invaluable privilege to live in the same period with a truly great man." That sentiment has my full accord. Our America owes its greatness, past and present, to its truly great leaders, such as Washington, Franklin, Jefferson, John Marshall, Webster, Clay, Calhoun, Robert E. Lee, and Abraham Lincoln. There has been a galaxy of others in public and private life who deserve mention, but space does not permit. What these great men said and wrought remains with us as pole-stars for all who will take heed; governmentally they are our invaluable inheritance.

Here in the State of Georgia, Chief Justice Bleckley, Joseph R. Lamar and L. Q. C. Lamar, all natives of Georgia, profoundly impressed the lawyers who lived in the same period with them. This writer knew personally and well Judge Bleckley, and almost intimately Judge Joseph Lamar. For more than twenty years I served on the Supreme Court of Georgia, and occupied the same work-room as did Joseph Lamar. The Georgia Reports that he used, with his name inscribed thereon, and in many of which his opinions were recorded, were constantly before me. During many months we had lived at the same hotel, using the same dining table, where discussions and views were freely exchanged. I followed and knew well the brilliant and impeccable honesty and fearless patriotism of L. Q. C. Lamar, as United States Senator from Mississippi and as a Justice of the Supreme Court of the United States.

I acknowledge deep and lifelong gratitude for that inestimable good fortune.

"To Strengthen the Courts Strengthens America"

■ "We are concerned with the problem of maintaining government of free men under law of their own making. The Courts were created and exist, not only to determine according to law disputes between individuals, but likewise to determine according to law disputes between the individual and his government. We emphasize and exalt the individual in our system of government. We are prone to overlook the important fact that through the judicial process the rights of the individual are made effective. Courts exist for that purpose. Courts, under our American system, are not instruments for the carrying out of administrative policy. They are not adjuncts of the Executive or legislative bodies. The Executive and legislative departments have their independent powers but the judicial power is not theirs. The Courts are that branch of government where the individual may go to seek and secure justice, not as a matter of privilege but as a matter of right. It is there that the strong arm of government may be stayed, if the rights of the individual which are guaranteed by Constitution or other law are invaded.

"An independent judicial department is the keystone of our American system. It is the great institution that America has that does not exist in and is denied to peoples in totalitarian states. The maintenance of free government in America is dependent upon the maintenance of an independent and strong and fully functioning system of Courts. Whatever we do to strengthen the Courts strengthens America. Whatever we fail to do to that end weakens our system and strengthens the hands of those who would change or destroy it. By the very nature of our profession as lawyers we must meet the challenge to free government that is made by those who would abolish the Courts or supplant their functions by transferring them to dependent agencies of the Executive or legislative departments."

—Chief Justice Robert G. Simmons, of the Supreme Court of Nebraska, to the Minneapolis State Bar Association on June 26.

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Individual Rights:

Editor Danielson Replies to Harold R. McKinnon

by Richard E. Danielson • Associate Editor of *The Atlantic Monthly*

■ Richard E. Danielson, brilliant Associate Editor of *The Atlantic Monthly*, contributes to our columns under the following circumstances: In our June issue (page 441) Harold R. McKinnon, of the California Bar, wrote on "Human Rights and National Unity: The Clue to Cataclysm That Endangers Our Future." In the course of his exposition, he cited and quoted from an article by Mr. Danielson, and treated it as denying the existence of natural rights of persons as contrasted with the collective will of the state. An Editor's Note (page 545) left open the question whether Mr. Danielson had intended his denial of basic rights to be as sweeping as Mr. McKinnon had read it to be. As a matter of fairness to the gifted layman whose views had been challenged in the *Journal*, we invited Mr. Danielson to make his own statement of them. He has now done so in a vigorous fashion.

To us it appears that there is a deep difference between Mr. Danielson's philosophy and that espoused in these columns by Mr. McKinnon. To round out the discussion of a vital issue, Mr. McKinnon, in the next article in this issue, comments upon Mr. Danielson's argument as given below. Our readers will choose between the two philosophies which are contending for mastery in the world and in our own country.

■ I appreciate your courtesy in allowing me to reply to Mr. Harold R. McKinnon's article: "Human Rights and National Unity" published in your June issue (pages 544-547). This article, a criticism of my paper, "The Right to Strike," which appeared in the February number of *The Atlantic Monthly*, contains certain misreadings of my argument to which I take exception; and I am grateful for the opportunity to point them out although, as a layman engaging in debate with a learned lawyer, I do so with more gratitude than confidence.

My *Atlantic* article was a short comment on a vast subject; it was not written from the standpoint of a lawyer, an ethical philosopher, or a metaphysician. It represented merely an effort on the part of that vague, homeless wanderer, The-Man-In-The-Street, to think his way through the fog of misconception which enshrouds the idea of human rights in general and the right to strike in particular.

As I understand Mr. McKinnon's argument, he bases his chief attack on the following interpretation of my thesis: "The issue is whether all of man's rights are grants from the state, or whether he possesses certain rights which are attributable to his nature and therefore to his Creator." Of course I never claimed that human rights were "grants from the state," but rather that they were adjustments worked out in society because of the compulsion on men living together to submit to certain regulations. But Mr. McKinnon finds this idea repugnant and prefers the assumption—as his major premise—that Man "possesses certain rights which are attributable to his nature" —whatever that is—"and therefore to his Creator."

Skepticism as to "Inalienable Rights" and Their Claimed Origin

If one granted this assumption, Mr. McKinnon's argument would be very formidable indeed. I admitted as much in my article when I wrote that the theory "that God endows each one of us with a ready-made assortment of inalienable rights," although an unprovable hypothesis, was a premise which, if granted, made a vast amount of nonsense wholly logical. Mr. McKinnon believes in that premise as an article of faith. I do not. There is probably no profit in arguing a point which seems to involve a kind of political-theological orthodoxy. But I must confess myself astounded that this particular doctrine should be solemnly upheld by "a distinguished and thoughtful California lawyer" or should be given a serious amount of space in your learned and valuable publication. I would have thought that as the legal

profession has been chiefly occupied from its beginning with the adjustment of changing or conflicting rights or claims of rights, lawyers as a whole might have come to regard the theory of the divine origin of these rights with a certain skepticism.

Moreover, Mr. McKinnon's assumption seems so nebulous, so confusing in its treatment of natural rights, moral rights, and legal rights, that I do not see how it can stand up before the most respectful inquiries propounded by a fellow lawyer, to say nothing of a layman. I do not know what Mr. McKinnon is talking about when he —or any of his fellow believers—refers to the Nature of Man or The Higher Law (although I have studied his pamphlet on this subject), or inalienable, inherent human rights.

Disavowal of Inherent Individual Rights

I do not know what these rights are, where they begin or end, at what point in an individual's life he becomes possessed of them, why they do not come into sharp conflict with the rights of others when men begin to live together, or what individual is qualified to define natural rights without Divine revelation. Perhaps they are created only as a logical convenience, an assumption on which to found a general philosophy, as one might assume, let us say, that the earth is flat and start from there. But I am convinced that in any case they must exist, if they do exist, in a kind of speculative or metaphysical vacuum.

If Mr. McKinnon were cast up alone on a desert island (which God forbid), he would, I suppose, be in full possession of his inherent rights. Certainly he would enjoy that perfect liberty which is so restricted by the disturbing presence of neighbors. But these inherent rights would be of no use or value to him. Not only would they fail to provide him with a single banana or coconut or clam, but there would be no one on whom he could exercise them. However, if another castaway were to arrive on his island, equipped with an identical set of rights, the problem of adjustment and concession would become immediate and important. If three or four castaways appeared, a whole body of crude jurisprudence would be necessary to keep them from cutting one another's throats for the sake of an extra clam. At this moment, necessity would create both Mr. McKinnon's profession and a common, workable understanding of individual rights which, I submit, it would be excessive to describe as "Grants from the state."

Most students of society find a connection between rights and duties or, at least, between rights and prohibitions or taboos. Mr. McKinnon and his fellow derelicts would certainly work out on their island a series of *Thou Shalt Nots.* Perhaps the Right to Life is implicit in the taboo Thou Shalt Not Commit Murder, and the Right to Private Property in the prohibition Thou Shalt Not Steal.

But, although from earliest times priests and rulers have loudly asserted that these regulations proceeded directly from the god or the oracle with whom they were vouchsafed confidential communications, their protests have never been wholly convincing. The taboos of Fiji, like a ruling of the Interstate Commerce Commission, seem to bear every evidence of man-made origin.

Mr. McKinnon's Reliance on the Founding Fathers

Mr. McKinnon, I think, leans too heavily on the Founding Fathers in the support of his theory of inalienable rights. A phrase used by one of them for a particular purpose becomes enshrined in patriotic theology and is repeated, in general thoughtlessly, by an endless succession of politicians and orators. It ends by becoming an article of faith, and it is rank heresy, or what is worse,

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Concerning the Author: Richard Ely Danielson was born in Brooklyn, Connecticut, in 1885, and was graduated from the William Penn Charter School in Philadelphia in 1903. He obtained his B.A. degree from Yale in 1907 and his M.A. in 1910. He was with the American Red Cross, in France, assigned to the French Army in 1917, and was commissioned a 1st Lieutenant of Infantry in the U. S. Army on April 12, 1918. He was Intelligence Officer at Nantes until the end of 1918. In February of 1919, he became a Captain, and was Intelligence Officer at Bordeau, then Assistant Chief of Staff for Base Section No. 2 until June of 1919, and was decorated with the Order of the Black Star.

Mr. Danielson was Editor of *The Independent* (Boston) 1924-28 and for ten years ending in 1937 the Editor of *The Sportsman* and president of the company which published it. In 1940 he became Associate Editor of *The Atlantic Monthly* and president of The Atlantic Monthly Company. He continues to hold these offices although he was absent on leave for three years and a half during World War II. He was commissioned a Major, A. U. S., in April of 1942; he served on the General Staff Corps with troops in June of 1942, and was made a Lieutenant Colonel in 1943. His service was in the Military Intelligence Division in French North and French West Africa. After his discharge from the Army in 1944 for physical disability due to an illness contracted in Africa, he served a while as a civilian in the Office of Strategic Services.

Mr. Danielson is a Republican and an Episcopalian. From 1922 to 1936 he was the Master of Hounds of the Groton Hunt Club. He is the author of *Martha Doyle and Other Sporting Memories (1938).* His home is in Groton, Massachusetts. "I am sorry to say that I have no recent photographs of myself to submit," writes Mr. Danielson, in response to our request, "other than the passport or military photographs which give me the expression of an unsuccessful burglar. They might prejudice readers of the article." Some of our readers may endorse his characterization, as to some of the photographs sent to us for publication.

un-American, not to swallow it, hook, line, and sinker.

When Mr. Jefferson supplied his part in the writing of the Declaration of Independence, he was a young man, strongly influenced by the political metaphysics of 18th Century France. He was also under the necessity of justifying open rebellion against the law of the land, acts of treason, and the breaking of the oath of allegiance to a lawful sovereign. This was possible only by formulating a Higher Law, by assuring his compatriots that they were acting to preserve sacred and inalienable rights, and that as a consequence God was on their side. Their opponents by similar reasoning were convinced, on the other hand, that in marching to battle they were obeying a divine mandate to fight for God and the King.

Framers of the Constitution Eschewed Metaphysics

The framers of the Constitution, however, were more experienced and hard-bitten men; they had won their war and were engaged in the bewilderingly difficult task of creating a new government and writing the fundamental law of the land. They indulged in no metaphysics or protestations of singular favor, but based their Constitution and Bill of Rights firmly and solely on the authority of the Public—whom they described as "We the People."

It is my humble contention that our rights today are created, amended, cancelled, or continued by the same authority.

Reply to Mr. McKinnon's Objections to Three "Principles"

Mr. McKinnon objects to the first two "principles" which I presented as in my opinion applying to all human rights: First, that they are always amendable; and second, that they are not acts of grace but bargains, bought and paid for by somebody, somewhere, sometime. It may well be that there are exceptions to these "principles" but I have been unable to find them and would be grateful to Mr. McKinnon if he would provide me with specific examples to the contrary.

It is, however, with my third "principle" that Mr. McKinnon takes the gravest issue. It seems to him that in it I provide a justification for the Totalitarian State and all the bitter fruits of Fascism and Communism. This principle as stated: "In all rights the individual is nothing, the public everything," is, I admit, expressed somewhat nakedly unless what is meant by "the public" is carefully defined. This I was at some pains to do, explaining that by "the public," I meant you and me, all of us, "We the People," that we were sovereign as against the individual, that the public good and the public necessity were paramount and controlling. Mr. McKinnon has translated my words, "the public" into "the state"—a most unpopular and disreputable phrase, and thence, by easy transition, into "The Totalitarian State"—which is damnable.

Does "Relativity" of Individual Rights Lead to Totalitarianism?

Furthermore, by a really acrobatic *non sequitur,* he asserts that my "principle" leads to the reign of the dictator and subjugation of the common man. This implication that I—as a humble seeker after the meaning of things—must end as a disciple and supporter of the late Hitler, is, to me, really objectionable and unwarranted. As I understand it, tyranny is the autocratic rule of an individual, together with satellite individuals, over the public. It is the extreme, almost lunatic exaltation of the individual to the confines and edges of divinity. It exists wherever the authority of "We the People" has been seized and perverted by a few. My doctrine, that the public should be and actually is the controlling power, seems to me exactly the antithesis of what Mr. McKinnon says it is.

Of course it is possible that an alleged democracy or a Communist state may begin with the rule of the people and that the control of that rule may fall into the hands of a vicious minority or of an Asiatic despot. But it is something new in argument to condemn a benignant principle of government because it is perverted by force, by circumstance, or by human failure, into malignance. If I applied the same thinking to Mr. McKinnon's theory of the importance of the individual, I should be forced to prophesy anarchy as inevitable. As it is, I have no such gloomy terrors, believing as I do, that the individual *must* yield to the public and that *obedience to the public will is democracy.*

There may exist, of course, a tyranny by a majority, in which the rights of the minority or of individuals are jeopardized. The propertied minority in Great Britain doubtless feel that such a condition exists there today. But I do not believe that the Conservative Party would look to revolution as a solvent of their grievances, but rather to that process of trial and error by which democracies progress, wherein the majority of today becomes the minority of tomorrow and a rough balance of equality and justice is attained.

To recapitulate very briefly: My article submitted that the public's interest is as controlling in other rights as it is in the right of eminent domain. Subject to correction, I consider the other two "principles" concerning rights which I presented to be sound in fact. As to the theory of inherent and inalienable rights bestowed by the Creator, I consider it sheer, convenient nonsense, in just about the same category as the other 18th Century French assumptions concerning the Natural Man and the Noble Savage. It would be less exhilarating but possibly more realistic to assume that all men are endowed by their Creator with an inherent selfishness or acquisitiveness of impressive proportions and vitality. We note the actual existence of this endowment in children until it is curbed by discipline and education. We note that an ethical conception is formed by the application of discipline, precept, and example. We note the persistence of this endowment in savage communities and

even in civilized societies. Such societies make laws and establish rights to restrain and regulate its various expressions.

Inasmuch as the legal profession interprets these laws and defends these rights so that the integrity of the free man is preserved to the limit required for the protection of the public as a whole, individual laymen like myself will always be grateful to your learned brotherhood.

Mr. McKinnon's Reply:

Individual Rights Are Not Bestowed by "The Public"

■ Mr. Danielson's basic contentions are twofold: *First,* he says that the theory of inherent and inalienable rights bestowed by the Creator is nonsense, and that our rights are created, amended, cancelled or continued by "the public". *Secondly,* he says that in all rights the individual is nothing, the public everything.

I say that that is the philosophy upon which the totalitarian state is based. Mr. Danielson disagrees. It is now my privilege to respond to his defense of his thesis.

Needless to say, the opposition here expressed is not directed against my opponent in this controversy but against the ideas which he defends. Nor am I contending that Mr. Danielson would be on the side of a tyrant like Hitler. Assuredly, he would be on the opposite side, as indeed he was in both world wars, in which he served in the Army of his country. My contention is that in performing that service he was defending the principles which he has here disclaimed, and that the principles which he has here defended constitute the fundamental or ideological basis for the evils against which he fought. In other words, it is my conviction that the basis for that freedom and justice which is prized by all of us, including Mr. Danielson, lies in the truth that the individual human person has certain rights which are prior[1] to the state and which in a certain sense and in certain respects are paramount to majority will and even to the common good. If this is true, it results in no defeat for Mr. Danielson or victory for the present writer, but it constitutes a happy basis for a just union of both, in a state whose dignity remains undisparaged and unimpaired.

Are Natural Rights Derived from "the Public"—the State?

Mr. Danielson discusses first the origin of human rights, and in that respect he claims that I misrepresented him as contending that human rights were grants from the state. But let us see. He rejects the divine origin of rights, and says that without exception man's rights are not inherent. Moreover, he says that rights "are privileges, granted to us at one time or another as the result of all kinds of pressures and forces"; that they are "adjustments worked out in society"; and that they are "created, amended, cancelled, or continued" in use by the authority described in the Constitution as "We the People," namely the public.

Thus it is clear that I have merely taken Mr. Danielson at his word. He says our rights are *grants* or *privileges, created* by "the public". And, contrary to his protestation, it is equally clear that by "the public" he really means the power and will of government – "the state". Because by "the public" in this context he necessarily means "the public" *as politically organized,* which is the state.

"Inalienable Rights" Do Not Stem from Religious Superstition

Mr. Danielson next says that the doctrine of inalienable rights is an article of *faith* in which I believe and in which he does not. That comment introduces a series of remarks which reveal a thinly veiled charge of religious superstition. There is reference to my "fellow believers", to "political-theological orthodoxy", and to "patriotic theology". Prohibitions against murder and theft are called *taboos,* which priests and rulers have attributed to "the god or the oracle with whom they were vouchsafed confidential communications". And he wonders whether natural rights are not a convenient assumption for a philosophy, like the assumption that the earth is flat.

I cite these comments, not to argue against them—because scoffing and sarcasm are products of emotion, not reason—but rather to confirm that Mr. Danielson is correct when he says that he does not know what I am talking about when I refer to the Nature of Man or The Higher Law or to inalienable, inherent human rights. Acquaintance with the history and literature of this doctrine would demonstrate that it is based upon reason not faith,[2] and to link

1. Prior in the sense that the individual person is an end in himself and the prerequisite of the state, not prior in the chronological sense. There is no pure "state of nature".

2. In my original article ("The Higher Law", February issue of the *Journal,* page 106), I ex-

it with Polynesian phantasies or the Delphic oracle is to enjoy a victorious encounter with an argument of his own creation.

Moreover, there is a curious unreality about Mr. Danielson's charge of nebulous unintelligibility with respect to human nature, higher law and inherent rights. For surely he cannot be unaware that for thousands of years those matters have been the object of the closest scrutiny by minds of the highest calibre, with the result that, as I showed in my original article, they have been defined with a clarity and accuracy which well merit the attention of any writer on the subject. Of course, these definitions are philosophical, which means that they are the result of refined rather than naive reasoning, and that they are designed, to the maximum of man's intellectual power, to cull away error and lay bare the truth.

Concept of Natural Rights Persist With "The-Man-in-the-Street"

But while these concepts have technical significance for the minds of experts, they also have a noteworthy persistence in the mind of The-Man-in-the-Street. For if we consider the nature of man, we find, for example, a remarkable habit of viewing him as different from other beings. By the mere fact that he is man, he is popularly credited with possessing ideals and a vision and a dignity which are lacking in such creatures as cattle or swine, and which give him a jurisdiction over them which he does not possess over his own brethren. In other words, man is obviously made for higher purposes, and therefore when he sets up government—which, by the way, experience shows it is "natural" for him to do—he *invariably* makes some rules to ensure that men will be treated as persons, not things. These man-made protections for rights may and do vary with the social enlightenment of the time and place, but in them there is always something indicative of this recognition of a *human* nature as contrasted with a *sub*-human one. There is always some recognition of human rights and obligations as such; a recognition which speaks in the conscience of men irrespective of revelation, genuine or spurious. It is pursuant to this unfailing human trait that man everywhere recognizes, in some way and in some degree, that it is wrong to kill, steal, plunder or otherwise treat men like beasts. And it is because of this persistent manner of thinking that some events are referred to as examples of moral *progress,* such as the emancipation of slaves, which was actually a recognition by a political power (although a long delayed one) of the higher, moral law that man is by nature a person, not property or a thing.

Applying an induction to such historical social behavior, the conclusions follow that there is a law which is associated with the life of man as such and therefore with human nature, and that this is a higher law than man-made laws because it applies to man not only as citizen but to man as such and is actually implemented by political organization; and that man has rights and obligations which are not merely conventional but innate because they are part and parcel of this law of his being. And if we wish to identify these rights we find them in those basic claims which all men, including Mr. Danielson, recognize, because they are essential to the perfection and happiness of man as such—namely, the right to live, to work, to practice one's religion, to acquire knowledge and train one's mind, to marry, to have children and rear and educate them, and so on.[3]

Inalienable Rights Are a Part of the American Tradition

If these things are not true, a heavy burden lies on those who, like Mr. Danielson, would gainsay them. For they must answer the questions: If there is no human nature or higher law or inherent right, what is that "justice" which in the preamble of the Constitution the "People" said they were seeking to establish? And if that justice is "creatable" and "cancellable" by the People without respect to a higher law, by what criterion is it "just", or by what criterion was the system which our forefathers established better than the late Nazi regime?[4] And if human nature and higher law and inherent rights are nebulous terms, by what distinction is there a clearer significance in Mr. Danielson's terms "public's interest" and the "integrity of the free man"?[5]

Mr. Danielson is "astounded" that the idea of inalienable rights should be upheld by a lawyer or given a serious amount of space in this JOURNAL. I cannot help expressing a similar astonishment that Mr. Danielson should protest against the inclusion in an American legal journal of a sympathetic account of the

(Continued on page 965)

amined and quoted in considerable detail the history and the literature of the doctrine of inherent human rights not bestowed by government or majority will. So I refer to that exposition, without repetition here.

3. Mr. Danielson challenges me to cite an exception to his propositions that all human rights are "amendable" and that they are bought and paid for. My whole article is designed to answer that challenge. His *Atlantic* article stated that all human rights are amendable, transitory, impermanent and cancellable. I reply that exceptions consist of those rights such as I have mentioned, which are inherent and inalienable. True, they are subject, in their exercise, to regulation, but not to denial or extinction. For example, a citizen's liberty is properly subject to numerous regulations, but it is not subject to extinction by placing him in a concentration camp merely because of his race. Regarding so-called "payment" for rights, the exception lies again in the fact that all inherent and inalienable rights are endowments of man's Creator. Naturally, a person must pay obligations incurred by him in the exercise of these rights, but the right does not flow from the consideration paid to others in its exercise. For example, I have a right to life, but I must pay for the food I purchase to sustain life. It would be manifest sophistry to contend that my very right to existence flows from the fact that I pay for the food that I buy.

4. Mr. Danielson's distinction with respect to a tyrant like Hitler does not meet the issue. He says that such a tyranny exists when the authority of the people has been seized and perverted by a few, but that the compulsory obedience by the individual to the public will is democracy. This overlooks the essential point that justice is the thing that matters, and that a democracy as well as a tyrant may be unjust. It is so whenever the People (through their representatives) violate the rights of the individual. To such an individual, it is immaterial whether the injustice which he suffers was directed by one or many. Absolute, unqualified subordination of the individual to the "public will" is *totalitarian* democracy.

5. The fact is that Mr. Danielson's terms are intelligible, but their meaning is actually derived from the very terms which he criticized. For example, "integrity" means wholeness, which in this context signifies that the human person is a whole, and not a mere part of the state and accordingly possesses personal—that is, individual—rights by his own title.

9

The Lord Chancellor:

The Career and Personality of Viscount Jowitt

■ Our Association's Annual Meeting in 1947 will be honored by the presence of the Lord Chancellor of England, the foremost judicial officer of Britain and the Commonwealth of Nations. He comes in the person of Viscount Jowitt of Stevenage, born William Allen Jowitt, in the County of Hertfordshire, who rose to place and power as one of the foremost of Britain's present-day lawyers and has been a dynamic figure of changing fortunes amid the vicissitudes of British politics. At a time when Americans have been following anxiously but with great good will the disturbing events in post-war England, the message of this noted lawyer for our people will be awaited with keen anticipation. Meanwhile, this sketch of his personality and career, prepared from material supplied us by Miss Joan Littlefield of the British Information Services and by the Librarian of the Middle Temple, will interest those who will greet him in Cleveland and those who cannot come. He has been our guest before; as Attorney General and as Sir William Jowitt, he attended our Annual Meeting at Chicago in 1930.

■ The present Lord Chancellor seems to have been born with every gift—good looks, a magnificent voice, charm, a commanding presence, wit, intellect, a fine command of words, a penetrating feel for the law, and a flair for politics. In his present high post, he works as hard as any man in Britain, and is acknowledged by members of the Bar and by his political opponents, as well as by leaders of the Labor Party, to be an accomplished holder of this great office.

William Allen Jowitt was born in 1885, tenth, and youngest child of a country parson, Rev. William Jowitt, rector of Stevenage in Hertfordshire. All the other children were girls; and all grew up with an intense interest in social work, so that their young brother was early imbued with a feeling for the needs of the people.

After a conventional education at Marlborough College and New College, Oxford, he was admitted as a student of the Middle Temple on November 15, 1906, and called to the Bar on June 23, 1909, having secured the third place in Class ii. at the Final examination in the Easter term preceding his Call. He was married in 1913, to Lesley, the second daughter of J. P. M'Intyre, of Princes Gardens, London.

His first brief at the Bar was to defend a colored man charged with murder. The young barrister visited his client in prison; and then spent hours working out a powerful speech that was to make his name at the Bar. Next day he learned that the accused had committed suicide.

It did not take Jowitt long to reach the top of his profession. "So faultlessly are facts and arguments mobilized in his speeches," an admirer once said of him, "that they suggest the imagery of the parade ground, every unit in its place, the whole marching in rhythmic order, the sunshine glinting with bayonets, and ever and anon the roll of the drums." By reason of his outstanding ability and his capacity for hard work, he rapidly acquired a large commercial practice and became one of the leading counsel at the Junior Bar. In 1922 he took Silk and continued to add to his already high reputation as a sound lawyer, his practice becoming one of the most lucrative at that time.

He was much sought after because of the enormous energy he put into his cases. Once, in 1933, he spoke over 500,000 words in one of the longest opening speeches in any Court of law. It lasted eighteen days, at the rate of five hours daily, and concerned the granting of radio patents.

In November of 1937, he was counsel for the Duke of Windsor in the libel action he brought against the publishers of a book called *Coronation Commentary*. For some years he was legal adviser to General Booth of the Salvation Army.

Beginnings of His Political Career With the Left Wing

If it had not been for his wife, who knew his great skills and was always ambitious for him, the future Lord Chancellor might have been content to remain a popular K. C., with time to indulge his interest in painting and music, and an income far larger than his political career has brought him. Instead, in 1922, he stood for Parliament and was elected as Liberal Candidate with Radical tendencies, from the teeming industrial constituency of Hartlepool in Yorkshire. But he always represented the extreme Left Wing of the Party, and though he played an important part in its inner councils in the later years of Lord Oxford's life, quarrels among colleagues drove him towards

the Socialists. He refused to vote with his party, cast his weight with the Government, did not return to Parliament in the 1924 election, but was appointed a member of the Royal Commission on Lunacy.

It occasioned no great surprise when he supported Labor's cause, was appointed Attorney-General in Ramsay MacDonald's second Labor Government, and was knighted. He fought and won Preston, in Lancashire, in 1929. In the same year he was called to the Bench of his Inn.

Jowitt as Storm Center in Political Controversies

When he took a place in the Labor Government, he knew he was starting controversy. He wrote at the time: "Those like myself who have hitherto taken their stand as Radicals must now consider whether they ought not to render active support to your party as being today the only party which is an effective instrument to carry through those reforms which the country desires." The reaction was immediate; the controversy loud. Although the Liberal party took no official action, the Preston Reform Club issued a strongly-worded resolution condemning his course.

Thus it was that he sought re-election as a Labor member, in a 1929 by-election. Amid hectic criticism from Liberals and Conservatives alike, he was returned to Parliament without difficulty and became Sir William Jowitt and Attorney General. In that capacity he came to America in 1930 and attended our Annual Meeting held in Chicago. In 1930 he steered the Trades Union Bill through Parliament and in 1931 he brought in the Trades Disputes Bill which clarified the right to strike in a purely industrial cause. He was appointed a Privy Councillor in 1931.

But the year of 1931 brought world-wide financial crises and redoubtable England saw Ramsay MacDonald take office as Prime Minister of a National Government. Sir William Jowitt joined the Scot. Again his political party seethed, and the Labor party expelled him. He stood for election in the Combined

THE RIGHT HONORABLE THE VISCOUNT JOWITT,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

Universities constituency but was defeated. No seat in Parliament could be found for him. Thus in January of 1932, he resigned as Attorney-General, closed the second chapter in his political adventures, and went back happily to his lucrative days in the courtroom.

Politics called him back to the hustings in November of 1936. Fortified by a reconciliation with the Labor party, he went back to Parliament for Ashton-under-Lyne, near Manchester, with no opposition. War came in 1939 and a Coalition Government ruled England. Lord Jowitt served in four cabinet posts during the critical years of world conflict, displaying to his country indomitable characteristics which carried the Government and its people through days and nights of "blood, sweat and tears." In 1940 Winston Churchill gave him the post of Solicitor General. In 1942 Jowitt became Paymaster-General, and was assigned special duties in planning post-war reconstruction. He served as Minister without Portfolio from 1943 to 1944. In the latter year he was named Minister of National Insurance. With his acute feeling for social betterment, his war work primarily was geared to solution of post-war problems, and it was to him that Sir William Beveridge rendered his famous report on social insurance.

The Lord Chancellorship, the Peerage, and Colorful Duties

The Labor victory in Britain in July of 1945, in England's first general election since 1935, brought Sir William the nomination by Prime Minister Attlee as Lord Chancellor, and King George VI bestowed upon him a Barony and the title of Baron Jowitt of Stevenage on August 2, 1945.

On that date he first presided over the colorful and ancient ceremonies attending the constituting of Parliament. In his busy first days in the cabinet he also became a signatory for Great Britain to the Charter which set up the International Tribunal for the trial of Nazi war criminals.

In January, 1946, he went up another step in the peerage to his present place as Viscount Jowitt of Stevenage, and was thereby entitled to add a third row of ermine and gold lace to his State Robe of gold cloth. He wears this on ceremonial occasions, together with a full-bottomed wig, frock-coat, embellished with lace, and knee-breeches. On these occasions, he must carry the Purse of State, a handsomely decorated bag weighing seventeen pounds which, though supposed to contain the Great Seal, is always empty. As Lord Chancellor, he ranks in official precedence immediately after the Archbishop of Canterbury, who is the first of the King's non-royal subjects.

The Office of Lord High Cancellor of Great Britain is the oldest and most dignified of the great mediaeval offices of the Crown. He takes precedence of all Dukes, except such as happen to be the King's son, brother, uncle or nephew, or the King's brothers or sisters' sons. By the Statute of Treasons, 1351, it is High Treason to kill him. He is custodian of the Great Seal; Speaker of the House of Lords; and head and first representative of the law in England. Judges of the High Court, except the Lord Chief Justice, are selected by him; and he has power of appointment and removal of County Court Judges. The principal judicial duty now regularly exercised by the Lord Chancellor is that of presiding upon the hearing of appeals to the House of Lords. The remuneration of the Lord Chancellor is £10,000 a year £6,000 as Lord Chancellor and (£4,000 as Speaker of the House of Lords). The office carries with it a retiring pension of £5,000 a year for life.

Side-lights on a Colorful and Dynamic Personality

Viscount Jowitt has long believed in social legislation that will give the poor man an equal chance with the rich. He would like to see more judges appointed so that parties to a defended divorce would not have to wait six months after a case is set down for trial. He is a firm believer in the freedom of the press and is impatient of the obscure jargon of certain Acts of Parliament. He once suggested that all laws should be written in rhyme so as to be easily intelligible to the people. It is his firm belief that "the very essence of democracy is government by discussion".

Viscount Jowitt is a trustee of the National and of the Tate Galleries, which is fitting in one who is something of an art expert. He has a modest but distinguished art collection of his own, mostly of modern works. As Lord Chancellor, he lives in a five-roomed apartment in the House of Lords, with beautiful views over the River Thames and its own entrance through Chancellor's Gate. Until recently, he also owned an old Tudor House at Wittersham, Kent where he used to challenge Duff Cooper to duels of ping-pong. He is a keen gardener. In 1939, he and his wife took in one hundred evacuated children. He played the part of adopted father with success, being very fond of children. In fact, he has said that his happiest day is "a bright day at the seaside helping small children to build sandcastles." He has only one child of his own, a daughter called Penelope. She married a doctor in 1943, and he now has a grandchild.

Viscount Jowitt has, throughout his life, shown himself to be a successful administrator and a lawyer of the highest ability and reputation. He carries out the many duties of his high office with a dignity and thoroughness which commands the admiration of all, whatever their politics or their economic and social beliefs may be. His return as Lord Chancellor to a meeting of our Association will be a memorable event in its history.

"To Preserve Uninfected by Contagion" Our Peculiarities in Government

■ Attorney General Tom C. Clark recently received from the hands of a direct descendant of President James Monroe a letter which Thomas Jefferson wrote from Paris in his own hand on June 17, 1785, in language which seems timely and applicable today. Jefferson said:

"I sincerely wish you may find it convenient to come here. The pleasure of the trip will be less than you expect but the utility greater. It will make you adore your own country, its soil, its climate, its equality, liberty, laws, people & manners. My *God!* How little do my countrymen know what precious blessings they are in possession of, and which no other people on earth enjoy. I confess I had no idea of it myself. While we shall see multiplied instances of Europeans going to live in America I will venture to say no man now living will ever see an instance of an American removing to settle in Europe & continuing there. Come then & see the proof of this, and on your return add your testimony to that of every thinking American, in order to satisfy our countrymen how much it is their interest to preserve uninfected by contagion those peculiarities in their government & manners to which they are indebted for these blessings.

"Adieu, my dear friend. Present me affectionately to your colleagues. If any of them think me worth writing to, they may be assured that in the epistolary account I will keep the debit side against them. Once more, Adieu."

10

Federal Judicial Nominees:

Favorable Results from Association's Scrutiny

■ The 1st session of the 80th Congress, which adjourned on July 26, was the first at which the President and the Attorney General, and the Senate Committee on the Judiciary and the members of the Senate, had the assistance of the information and judgment of the American Bar Association, through its Committee empowered for the purpose, as to the qualifications and fitness of persons proposed for nomination, or nominated, for federal judicial office. In this new undertaking in the interests of the public, the federal judiciary and the profession of law, the Association's Committee headed by John G. Buchanan of Pittsburgh as Chairman had to organize itself for its important work, explore new ground, and develop new courses and bases of action. The members of the present majority party in the Senate Committee on the Judiciary, with Senator Alexander Wiley of Wisconsin as chairman, had the responsibility for reporting as to the confirmation of nominations, for the first time in many years.

Partisan considerations appear to have been broadly laid aside in the investigations and recommendations made by the Senate Committee, as well as in the work of the Association's Committee. Efforts to have party service laid aside in the making of nominations for District and Circuit judgeships as well as in confirmations by the Senate were not successful.

The record of results up to the adjournment of the recent sessions, as tabulated below, shows definite progress toward placing the emphasis on experience, judicial temperament, independence and fitness, and all-around qualifications for judicial service:

Recommended by the Association's Committee and by the State and local Bar Associations in New York for appointment and confirmation, appointed by The President, and confirmed by the Senate:

HAROLD R. MEDINA, to be a District Judge for the Southern District of New York.

Appointed by The President, recommended by our Committee, and confirmed:

GEORGE W. FOLTA, to be a District Judge for the District of Alaska;

ROBERT E. THOMASON, to be a District Judge for the Western District of Texas;

ALBERT V. BRYAN, to be a District Judge for the Eastern District of Virginia;

JOHN CASKIE COLLET, United States District Judge, to be a Circuit Judge for the Eighth Circuit;

JOE B. DOOLEY, to be a District Judge for the Northern District of Texas (see "Lawyers in the News," in this issue);

DAVID CHAVEZ, JR., to be a District Judge for the District of Puerto Rico.

Appointed by The President, opposed by the Association's Committee in its comment to the Senate Committee on the Judiciary, reported favorably by that Committee, and confirmed:

JED JOHNSON, to be a Judge of the United States Customs Court;

LEO F. RAYFIEL, to be a District Judge for the Eastern District of New York.

Appointed by The President, recommended by the Association's committee subject to investigation of a particular charge by the Senate Committee, and not acted upon by the Senate before adjournment on July 26:

ROY W. HARPER, to be a District Judge for the Eastern and Western Districts of Missouri.

Appointed by The President, neither recommended nor opposed by the Association's Committee in its comment to the Senate committee in view of a division of opinion among the Association's Committee and among those whom it consulted for information and opinion; nomination held over by the Senate until the next session:

HERBERT W. CHRISTENBERRY, to be a District Judge for the Eastern District of Louisiana.

In two instances the Senate Committee by a divided vote, and the Senate, confirmed nominees on whom the Association's Committee had advised adversely. The action as to Former Congressman Jed Johnson, of Oklahoma, to be a Judge of the United States Customs Court, was reported in our July issue (page 699). The opposition of Former Secretary Harold Ickes to the nominee, and the latter's independence of action in some matters in the Congress, seemed to react in his favor.

The Association's Committee took

no stand that reflected unfavorably on the nominee's character or ability, but was of the opinion that his long service in the legislative branch did not in itself constitute sufficient experience at the Bar to establish his qualifications for judicial work.

Our Committee suffered its most serious set-back in the nomination and confirmation of Representative Leo F. Rayfiel of Brooklyn, who had been a member of Congress for two years. Nothing unfavorable to the nominee's character or ability appeared. The New York State Bar Association and our Association's Committee took the stand that the selection of Mr. Rayfiel by the political organization of his party had been made on the basis of rewarding faithful party service and that the nominee had not had sufficient courtroom and professional experience to warrant a disregarding of the reasons for his selection. The State and local Bar Associations suggested other nominees who were deemed to be more clearly qualified. A majority in the Senate Committee was of the opinion that the nomination having been made and the nominee appearing to be a lawyer of good character and capacity as well as creditable legislative experience, he should be confirmed. The Senate accepted the favorable report of its Committee.

11

Military Tribunals:

Appointment of Judges at Nuremberg

■ When appointments were to be made during the past ten months to numerous judicial positions of a temporary character, The President of the United States did not hesitate to cut across party lines in quest of fitness and qualifications and thereby to give substantial representation to members of the majority party as well as his own. This took place in the appointments made of American judges and lawyers as members of the six tribunals which are sitting at Nuremberg, Germany, for the trial of Nazi war criminals, etc.

In the appointments made to life tenure in the Circuit and District Courts, only members of the minority have been nominated, with the result that only members of one political party have been reported favorably to the Senate by its Committee on the Judiciary and have been confirmed for such offices. As was to be expected, our Association's Committee to report as to nominees for the federal judiciary has not attached significance to party service or affiliations and has advised favorably on such nominees as possessed the requisite experience, independence, and fitness for judicial office. At the same time, the exclusion of lawyers of the majority party from selections for appointments for life tenure in those Courts has been accentuated by the readiness to appoint to temporary posts members of that party already in office in State Courts. Many of the highly qualified members of both parties would doubtless have accepted gladly any proffer of appointment to life positions in the federal judiciary.

The men chosen for membership in the Nuremberg Tribunals are shown in the list following. Those who are members of our Association are denoted by an asterisk; the year in which they became members is shown in parentheses. Also given in parentheses is each person's party affiliation where known.

TRIBUNAL NO. 1

*Walter B. Beals, Chief Justice of the Supreme Court of Washington (1945) (Rep.)

Harold L. Sebring, Justice of the Supreme Court of Florida (Dem.)

Johnson T. Crawford, formerly Judge of the District Court of Oklahoma (Dem.)

Victor C. Swearingen, (Michigan), Special Assistant to the Attorney General

TRIBUNAL NO. 2

*Robert M. Toms, Judge of the Circuit Court of Detroit, Michigan (1925) (Rep.)

*Michael A. Musmanno, Judge of the Court of Common Pleas, Pittsburgh, Pennsylvania (1924) (Dem.)

F. Donald Phillips, Resident Judge, 13th Judicial District, Superior Court of North Carolina (Dem.)

John J. Speight, Referee in Bankruptcy in Alabama (Dem.)

TRIBUNAL NO. 3

*Carrington T. Marshall, formerly Chief Justice of the Supreme Court of Ohio, who has resigned because of poor health (1919) (Rep.)

M. B. Blair, Judge of the Court of Civil Appeals, Austin, Texas (Dem.)

*James T. Brand, Justice of the Supreme Court of Oregon (1928)

Justin Woodward Harding, formerly Judge of the U. S. District Court of Alaska (Rep.)

TRIBUNAL NO. 4

*Charles B. Sears, Official Referee, formerly Justice of the Court of Appeals of New York (1912) (Rep.)

*Frank N. Richman, formerly Justice of the Supreme Court of Indiana (1920) (Rep.)

William C. Christianson, formerly Justice of the Supreme Court of Minnesota (Rep.)

Richard Dillard Dixon, formerly Judge of the Superior Court of North Carolina (Dem.)

TRIBUNAL NO. 5

*Charles F. Wennerstrum, Chief Justice of the Supreme Court of Iowa (1922) (Rep.)

*Edward F. Carter, Justice of the Supreme Court of Nebraska (1928) (Rep.)

*George J. Burke, (Michigan), member of the Advisory Committee on Rules of Criminal Procedure, Supreme Court of the United States (1920) (Dem.)

TRIBUNAL NO. 6

*Curtis G. Shake, formerly Justice of the Supreme Court of Indiana (1935) (Dem.)

*Paul M. Hebert, Dean of the Law School, Louisiana State University (1932) (Dem.)

James Morris, Justice of the Supreme Court of North Dakota (Rep.)

We regret that space does not permit us to give portraits of all of the members of our Association who are serving on these Tribunals. A likeness of Chief Justice Wennerstrum of Iowa was in our June issue (page 607) and of former Chief Justice Marshall of Ohio in the April issue (page 370).

The comment has been made that in many instance the above appointments have taken men away from their judicial work in the States for long periods of absence abroad. It should be noted, however, that they have been designated only for judicial work, in Tribunals in which the prestige and competence of the incumbents are important for the good repute and authority of our country in the tasks it has undertaken in occupied lands.

12

Improving Military Justice:

Association's Proposals Favored in the House

■ With strong support from the Association's Committee headed by Congressman Albert L. Reeves, Jr., of Kansas City, and against an unfavorable stand by the War Department and the Chief of Staff, H. R. 2575, by Charles H. Elston, of Cincinnati, (Representative for the First District of Ohio) to carry out the recommendations of the Advisory Committee nominated by the Association and appointed by the Secretary of War, made substantial headway in the House of Representatives before the first session of the 80th Congress adjourned on July 26.

The Sub-committee on Military Justice, in the House Committee on the Armed Services, reported the Elston bill favorably to the full Committee, with some minor amendments to conform the bill to the recommendations of the Advisory Committee headed by Dean Arthur T. Vanderbilt, of New Jersey. The members of the Sub-Committee were: Chairman Elston, Charles R. Clason (Republican, Massachusetts), William E. Hess (Republican, Ohio), J. Leroy Johnson (Republican, California), Harry L. Towe (Republican, New Jersey), Walter Norblad (Republican, Oregon), Overton Brooks (Democrat, Louisiana), Paul J. Kilday (Democrat, Texas), and L. Mendel Rivers (Democrat, South Carolina). R. Ewing Thomason (Democrat, Texas) was on the Sub-Committee at the time of the report, but is not at the present time.

In an effort to obtain a modification of the bill in vital respects, the War Department and the Chief of Staff asked for a further hearing by the full Committee. This took place on July 15. The Association's Committee supported the bill as perfected by the Sub-committee. The Committee on the Armed Services decided on July 22 to report the Elston bill favorably to the House, in order to put it in a position for consideration and action when the Congress re-convenes in January.

The report and recommendations of the Advisory Committee were published in 33 A.B.A.J. 40; January, 1947. The action of the then Secretary of War, Judge Robert P. Patterson, approving and putting into force many of the proposals but withholding approval from several which were deemed most vital, was reported in 33 A.B.A.J. 319; April, 1947. (See also, the comments on the Advisory Committee's Report in 33 A.B.A.J 284; March, 1947.)

■ In accordance with the action voted unanimously by the House of Delegates, our Association will continue its active efforts to obtain the legislative adoption of the considered recommendations of the Advisory Committee selected by the Association at the request of the War Department. The Association's special committee for the purpose consists of Congressman Albert L. Reeves, Jr., of Kansas City, as Chairman; Paul B. DeWitt, of New York City; Ross L. Malone, Jr., of Roswell, New Mexico; and William L. Ransom, Jr., of Binghamton, New York. President Carl B. Rix has given full support to the work of the Committee. There appear to be excellent prospects of favorable action on H. R. 2575 soon after the Congress re-convenes.

At the hearing before the House Committee on the Armed Services, the Association's Committee on Military Justice submitted the following statement, which dealt principally with the main issue in controversy between the War Department and our Association:

"On March 25, 1946, the War Department established in the Office of the Secretary an Advisory Committee, whose membership was nominated by the American Bar Association and whose function, as determined by the Secretary of War, was to recommend 'changes in existing laws, regulations and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army.'

"The distinguished membership of that Committee, the elaborate care with which the Committee accomplished its work, the excellence of its report, and the almost unanimous approval with which its recommendations were received, are well known to everyone interested in action to correct what the Committee has rightly called 'a disquieting absence of respect' for the operation of our present system of military justice. It is the purpose of this statement to place on record the American Bar Association's emphatic approval of the recommendations made by the War Department's Advisory Committee and, particularly, to point out the crucial importance of the Advisory Committee's recommendations for 'the checking of command con-

trol.' (See Report of War Department Advisory Committee on Military Justice, December 13, 1946, page 6.)

"It would serve no purpose here to re-state the arguments demonstrating that unless the control of courts martial by command is checked, no important improvement in our system of military justice can be expected. These arguments have been most forcefully stated in the Advisory Committee's report and by any number of qualified witnesses testifying at the hearings on H. R. 2575 before the Armed Services Committee. Indeed, the critical importance of this reform must always be emphasized by those interested in developing a system of military justice that will embody the Anglo-American ideals of equal justice under the law. For example, a like concern for the independence of officers acting in a judicial capacity is found in the *Report of the Army and Air Force Courts-Martial Committee, 1938* presented by the Secretary of State for War and the Secretary of State for Air to Parliament.

"Because it is so clear that a fundamental requirement for a system of justice is an impartial court that is free from influence and any possibility of intimidation, it is disturbing to find that it is precisely in this fundamental that the War Department has departed from the recommendations of its own Advisory Committee. A further disturbing aspect of the War Department's attitude is that no reasons have been given for the Department's cursory treatment of the one reform without which the other proposals have little relevance. It is true the Department has agreed to add to the *Manual for Courts Martial* amendments that would admonish commanding officers not to 'influence' a court martial in reaching its findings or pronouncing its sentence. This does not meet the need for an independent system of justice. What is needed is the complete removal of the opportunity and the temptation to influence what should always be an impartial court. Until the commanding officer no longer has the right to select judge, jury, prosecutor and appellate tribunal, no court will be free from the suspicion and the possibility of influence. When it is also true that a commanding officer's influence may involve his absolute control over the future careers of the members of the court, half-measures that seek merely to curb, but not eliminate, such control should not be adopted.

"Although the checking of command control is by far the most important of the recommendations made by the Advisory Committee, the other recommendations made in its report should also be embodied in any measure reported to or enacted by the Congress. This statement has, however, been confined to what is considered to be the most crucial decision before the Armed Services Committee with respect to the pending bill.

"It is urgently recommended that H. R. 2575 be favorably reported to the House with amendments which embody the recommendations of the War Department Advisory Committee on Military Justice on the subject of command control of courts martial."

Former President Lashly Makes Survey of European Lawyer's Needs

▪ Former President Jacob M. Lashly, of St. Louis, as Chairman of our Association's Committee in aid of lawyers in devastated European areas, is journeying through France, Italy, Belgium, Holland, Switzerland, Great Britain, and the American Zone of Germany, to observe at first-hand the economic conditions of the profession and prepare for the report which he will make to the Association and the House of Delegates in Cleveland this month. American lawyers have been keenly aware of the adversities and deprivations suffered by their brethren in Europe, but have been at a loss to know what they could tangibly do to help. Restoration of the legal profession to conditions of independence and self-respect is an indispensable step toward resisting in Western Europe infiltrations and propaganda of the Communists who capitalize on despair. Typewriters and office equipment to replace those destroyed in the war are known to be a prime need. Although Mr. Lashly is in Europe as the representative only of our Association, his presence will be a cheering token to the lawyers of Western Europe that the Bar of America makes common cause with their efforts to restore law, Courts and lawyers to their traditional place in a re-established order. Mr. Lashly's report will be a feature of our Cleveland meeting.

13

Aviation Law:

What Care Is Required of an Air Carrier?

by **Gibson B. Witherspoon** · of the Mississippi Bar (Meridian)

■ A new field of law, in which cases turn up unexpectedly in law offices anywhere, is as to the liability of airplane common carriers. The case law on various aspects of this problem has been brought together in a practical form in the following article, which gives the angles that arise in forming an opinion as to liability or in trying a case. The author is in general practice in Meridian, Mississippi, and became particularly interested in his present subject through his work as one of the representatives from his State in the National Conference of Commissioners on Uniform State Laws.

Gibson B. Witherspoon's writing in the field of air law has gained him wide recognition. "What Care Is Required of a Carrier by Air?" appeared in a recent issue of the *Mississippi Law Journal*. An article in another field, "Should Bureaus Be Substituted for Our Probate Courts?", which appeared originally in the *Mississippi Law Journal*, was widely commented upon by lawmakers and lawyers throughout the Nation. It was read into the *Congressional Record* on May 14, 1945.

From his early boyhood in Virginia, where he was born at Lexington in 1903, Mr. Witherspoon's ambition was to become a lawyer. He attended Washington and Lee University, where he received his A.B. and LL.B. degrees.

He is a member of the American Bar Association (since 1943), and of the Mississippi State, Lauderdale County Bar Associations and of the National Commission on Uniform State Laws. He is an associate editor of *Commercial Law League Journal*.

■ Since our country has returned to pursuits of peace, commercial aviation is on its way to fulfill cherished hopes and prophecies of its leaders. Aviation insurance is keeping pace; few planes rise from the earth without protection. Since V-J Day and the release of military personnel trained in our air forces, the public is becoming more air-minded. Many thousands of new pilots are being trained under the GI Bill of Rights. Established air lines are operating passenger and cargo planes on regular schedules; they connect all principal centers. The Civil Aeronautics Board has hundreds of applications, being processed, for establishment of new lines called "feeders". On established commercial routes and on new "feeder lines", accidents will take place and liability will give rise to many questions. When a client comes into the office, there are three primary matters to be considered in your investigation to determine any liability of the carrier:

I. An "Act of God".

Air carriers are not liable for death or injuries sustained in accidents which are the results from an "act of God."[1] What is an "act of God?" Whether the injury was caused by an "act of God"[2] or the occurrence was such an act[3] is generally held to be a jury question. All authorities are in accord that all human agencies must be excluded from the cause of injury. It is also a jury question as to whether there was a mixture of human negligence with an "act of God." When this defense is relied upon, the defendant must prove there was no negligence on its part but the sole proximate cause of the tragedy was an "act of God." "No matter what degree of prudence or care may be exercised by the carrier or its servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if there be any co-operation of man or any admixture of human means, the injury is not in a legal sense an act of God."[4]

II. Passenger's Assumption of Risks

The passenger assumes not only the risks of "acts of God," but also the risk of such contingencies as inevitable accidents,[5] sudden emergen-

1. *Allison* v. *Standard Air Lines*, 65 Fed. (2d) 668.
2. *Ford* v. *Wabash Ry.*, 300 S. W. 769.
3. *13 C. J. S.*: "Carriers", page 899.
4. *4 R. C. L.*: "Carriers", page 181.
5. *Conklin* v. *Canadian Colonial Airways*, 266

cies[6], unforeseen events[7], and, in some jurisdictions, contributory negligence which bars recovery[8]. The rule is stated by Hotchkiss thus:[9]

> A passenger who goes up in an airplane must be presumed to have assumed the risk attendant upon that form of locomotion. He knows that a bullock-drawn cart is much safer, but it is not to be supposed that he expects to have the speed of an airplane joined with the freedom from danger that the bullock cart possess. Throughout the common-law rules of negligence there runs the thread of assumption of risk. It may not always be referred to in that way but the various standards of care that courts set up clearly reflect its existence.

The relation of passenger and carrier must be shown to exist and also that the carrier was a common one whose conduct amounted to a public offer "to carry for all who tendered him their goods or their person as he is accustomed to carry."[10] After this relationship is established, the passenger assumes only usual and ordinary perils incident to air travel. The rule was expressed ably in a charge to a jury:[11]

> The deceased in this case necessarily took upon himself all the usual and ordinary perils incident to airplane travel. A carrier is not an insurer of the safety of its passengers and is not bound absolutely and in all events to carry them safely and without injury. All passengers take the risk of those dangers which cannot be averted by the carrier by the exercise of the degree of care which the law requires.

Judge Joseph W. Cox in *Geo. P. Kimmell* v. *Penn. Airlines and Transport Co.* (1937), charged the jury thus:[12]

> This new art takes men traveling through the ocean of air surrounding the earth. The art is still no doubt in its infancy, but it is so advanced that men now engage in the business of transporting passengers through the air for hire and become what we call carriers of passengers and are required to serve all alike. These carriers do not insure the safety of their passengers but because they are paid for their services and have control of their instrumentalities of transportation in which they carry passengers they are required to exercise a very high degree of care for the safe transportation of their passengers.
>
> The jury is instructed that if you find that the ship in which the Plaintiff was a passenger was in good mechanical condition and handled by a careful and experienced pilot, but the Plaintiff received injuries from a climatic condition which the pilot could not have foreseen, taking into consideration the various witnesses and the U. S. weather report, and all the evidence before you, of course, your verdict must be for the defendant.

The average juror will be amazed at the instruments carried by planes to make them safer, the frequent mechanical checkups, and the detail record kept in the plane's log book. The plaintiff must either prove negligence or rest his case on the doctrine of *res ipsa loquitur*. In either case a defendant can make a very real thing out of the defense that the plaintiff assumed the risk.

The plaintiff does not assume the risks from violations of air commerce regulations, which are held to be evidence of negligence; but in order to establish liability it must be shown that such a violation or omission was either a concurrent or proximate cause of the accident.[13] The United States is a party to the Warsaw Convention which governs international transportation.[14] In international air travel the carrier is charged with liability unless he can prove either that he took all necessary steps to avoid the accident or that it was impossible to take such steps under the existing circumstances.[15] Our Courts seem to apply whenever possible, [16] the rules laid down at the Warsaw Convention to international transportation cases, although the accident may have happened in a country that is not a party to that treaty.[17] The rules apply where an accident happened within the territorial jurisdiction of the United States provided the passenger purchased a ticket to some foreign port.[18]

III. The Application of *Res Ipsa Loquitur*

If it could be said that it is the duty of a common carrier by air to exercise the highest degree of care consistent with the practical operation of the plane[19], and the carrier would be liable if the accident were not an "act of God" or an assumed risk of the passenger, the law would be simple. There are many border-line cases between these general classifications, and Courts often invoke the doctrine of *res ipsa loquitur* in establishing liability. The authorities seem to make no distinction in the application of the doctrine to private and common carriers.[20] The theory does not apply to cases wherein dual-control planes are involved, if the plaintiff or parties other than the defendant alone had access to or were operating the plane at the time of the crash.[21]

The law imposes a duty on the commercial air carrier, not only with respect to the operation of the plane, but also as to its equipment, maintenance, adjustments, pilots and weather forecast.[22] This same duty is owed a passenger gratuitously carried.[23] In determining the degree of care necessary, the equipment employed at the time is of primary im-

N. Y., 244, 194 N. E. 692.

6. *Thomas* v. *American Airways*, 1935 U. S. Aviation Reports 102.

7. *Allison* v. *Standard Air Lines*, 65 Fed. (2d) 668.

8. *Ebriete* v. *Crawford and O'Donnell*, 215 Cal. 724; 12 Pac. (2d) 937.

9. Hotchkiss: *The Law of Aviation* (Second Edition) page 44, par. 38.

10. *North American Accident Ins. Co.* v. *Pitts*, 213 Ala. 102, 104 So. 21.

11. *Allison* v. *Standard Air Lines, Inc.*, 65 Fed. (2d) 668.

12. No. 86181 in the District Court of U. S. (D. C.) 1937 *U. S. A.* v. *Ry.* 104.

13. *T. A. T. Flying Service, Inc.* v. *Adamson*, 47 Ga. app. 108, 169 S. E. 851; 6 *American Jurisprudence*: "Aviation", page 37, par. 66.

14. Liability is limited for injury or death to $8,291.87 U. S. Currency, Congressman O'Hara introduced H. R. 532 in the 79th Congress which would limit liability in death cases in the U. S. to $10,000.00 and provide for rebuttal presumptions of liability. No doubt a similar bill will be introduced. Sixteen States and the District of Columbia have statutory limits for death cases.

15. *Wilson* v. *Colonial Air Transport*, 278 Mass. 420, 180 N. E. 212. 1933 U. S. Av. Rep. 139.

16. *Indemnity Insurance Co.* v. *Pan-American Airways*, 68 Fed. Supp. 338.

17. *Gracia* v. *Pan-American Airways*, 55 N. Y. Supp. (2d) 317. A Clipper crashed when attempting to land at Lisbon, Portugal not being a party to the Warsaw Convention.

18. Where a plane was lost between Guam and Manila; *Wyman* v. *Bartlett*, 43 N. Y. Supp. (2d) 420, 48 N. Y. Supp. (2d) 459; 293 N. Y. 878.

19. *North American Accident Insurance Co.* v. *Pitts*, 213 Ala. 102, 104 Sou. 21.

20. Davis: *Law of Air Carriers* (1934), page 51.

21. *Morrision* v. *LeTourneau Co.* 138 Fed. (2d) 339; *Towle* v. *Philips*, 172 S. W. (2d) 806; *Budgett* v. *Soo Skyways*, 64 S. D. 243, 266 N. W. 253; and *Michigan Auto Club* v. *Shelly*, 283 Mich. 396, 278 N. W. 110.

22. 6 *American Jurisprudence*: "Aviation", page 36, paragraph 62; 99 A. L. R. 173.

23. 83 A. L. R. 333; 99 A. L. R. 190.

portance. Thus the degree of care of a small "feeder-line" pilot with a tiny craft would not be as high as for a transcontinental ship, which has all the safety instruments, all the safety instruments the human mind can devise, and two pilots at the controls. In every case the pilot must give the passenger explicit instructions regarding the safety belt; there is liability where the pilot allows a passenger to step out of the plane unassisted and the latter comes in contact with the propeller which is still revolving.[24]

Primarily *res ipsa loquitur* is a rule of evidence. Some Courts hold, for example, that it is applicable only where the relation of a carrier and passenger is established,[25] or where there is a contractual relationship between the parties.[26] The weight of current authority seems to be that the mere absence of such a relationship does not prevent the application of the rule, which it is held to depend on the circumstances of the particular accident.[27] "The application of the principle of *res ipsa loquitur* depends on the circumstances and character of the occurrence and not on the relation between the parties except indirectly so far as that relation defines the measure of duty imposed on the defendant."[28] From the early cases it would appear that the doctrine was invoked because of public policy. Thus in *Seaman* v. *Curtis Flying Service*,[29] the plaintiff's husband had been killed while riding in a plane operated by the defendant's employee. Negligence was predicated on the employee's maneuvering too low, at an unsafe speed, and in a dangerous manner. No request had been made for the invocation of the rule, but on appeal the higher Court held:[30]

> The charge was likewise prejudicial in its failure to charge the doctrine of res ipsa loquitur which had, under the facts appearing in the record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability.

Two years later, in *Conklin* v. *Canadian Colonial Airways*,[31] doubt was cast as to the correctness of the decision. In 1937 the New York Court reversed the ruling and held that the doctrine would not be applicable where the plaintiff relied on specific acts of negligence.[32] In one of the best-reasoned early cases, the Court said:[33]

> . . . in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care and . . . ordinarily when such an accident occurs, it is due to failure on the part of the person operating the plane to use the proper degree of care in so operating it, or . . . the manner in which defendant used or directed the instrumentality under its control. The language is peculiarly apt in the instant case. If the proper degree of care is used a collision in mid-air does not ordinarily occur and for that reason the doctrine was properly submitted to the jury.

Therefore, it would seem that a plaintiff must, before filing suit, make an election between a declaration predicated upon specific acts of negligence and a complaint bottomed upon *res ipsa loquitur*, because reliance on specific acts of negligence would preclude the invocation of the doctrine.[34]

There is a conflict in the authorities as to the effects given *res ipsa loquitur*, e.g.:

1. That upon proof of the essential required for the doctrine's application and the defendant's failure to offer evidence, the case should be submitted to the jury.
2. That the plaintiff who makes out a *res ipsa loquitur* case is entitled to a directed verdict in absence of defendant's evidence.
3. That the plaintiff who establishes a *res ipsa* case not only is entitled to a directed verdict in absence of evidence by defendant, and a defendant who offers evidence to rebut the plaintiff's *prima facie* case must assume the burden of proving by the weight and preponderance of such evidence its own freedom from negligence.

GIBSON B. WITHERSPOON

The conditions requisite for the application of *res ipsa loquitur* were well summed up by the trial Court in its charge in *Parker* v. *Granger*:[35]

1. That the general experience of mankind shows that the accident was such that it does not usually occur in the ordinary course of events without negligence upon the part of those in control;
2. The person against whom the doctrine is sought to be invoked must have been in control of that instrumentality;
3. The person invoking the doctrine must not be in a position to know the cause of the accident; and
4. The person against whom the doctrine is invoked must possess or have possessed superior knowledge as to the cause of the accident or must be or have been in a better position to obtain that knowledge, so that the duty of explaining the

24. *Spees* v. *Boggs*, 198 Pa. 112, 42 Atl. 875.
25. *Cosulich* v. *Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259.
26. *Griffin* v. *Manice*, 166 N. Y. 188, 59 N. E. 925.
27. *Smith* v. *O'Donnell* (Cal.) 5 Pac. (2d) 690; 12 Pac. (2d) 933.
28. *Smith* v. *O'Donnell* (Calif.), 5 Pac. (2d) 690; aff. 12 Pac. (2d) 935.
29. 231 App. Div. 867, 247 N. Y. Supp. 251.
30. 247 N. Y. Supp. 253.
31. 266 N. Y. 244; 194 N. E. 692.
32. *Goodheart* v. *American Airlines, Inc.*; decided December 30, 1938, but not officially reported. See *New York Law Journal* for January 25, 1938.
33. *Smith* v. *O'Donnell*, 215 Cal. 714, 12 Pac. (2d) 933. See also *McCuster* v. *Curtis Wright*, 269 Ill. App. 502, 1933 U. S. Av. Repts. 105; *Miller* v. *English*, 43 S. W. (2d) 642 (Texas 1931), 1932 U. S. Av. Repts. 109. It was held that the operator of a plane is not liable to his passenger in a collision in mid-air where the negligence was attributable entirely to the negligence of the operator of the second plane. See also *Wilson* v. *Colonial Air Transport*, 278 Mass. 420, 180 N. E. 212; 1933 U. S. Aviation Reports 139.
34. *McCusker* v. *Curtis-Wright Flying Service*, 269 Ill. App. 502; *Mitter* v. *English*, supra.
35. 52 Pac. (2d) 226, (Cal. 1935).

> accident should, in fairness, rest upon him on account of the greater knowledge or greater means of knowledge.

In 1937 a United States District Judge held:[36]

> It may be in the not too distant future in the evolution and development of this wonderful and enchanting science of aviation a sufficient fund of information and knowledge may be afforded to make a safe basis for applying of *res ipsa*, but the time has not yet arrived.

In 1946 a federal judge submitted "to the jury on the doctrine of *res ipsa loquitur*" three cases where an airliner crashed in Utah, killing all aboard.[37] This opinion represented the present-day trend.

IV. Liability to Persons and Property on the Ground

The Courts usually hold that the same considerations of reason, justice and policy which underlie the rules of common law will still apply modified and adapted to the new circumstances, to collisions in the skies. In order to fix liability for damage to persons and property on the ground, other than the mere passage of the airplane, the following three standards have been suggested:[38]

1. A rule of absolute liability, under which the person injured or damaged, is allowed to recover regardless of any question of negligence except his own. By this is meant that the owner or operator of the aircraft producing the injury will be absolved of liability only if the injured party has been contributorily negligent;

In support of the proposition that the doctrine of absolute liability ought to be applied to cases involving injuries by aircraft to person or property on the ground, it is alleged:

(a) That persons on the ground are helpless to avoid injuries to themselves or to their property,

(b) That the airplane is an inherently dangerous instrumentality and that the safety of flight by air is dependent upon factors beyond human control, and

(c) That, for all practical purposes, it is almost impossible for the person injured to prove the cause of such accident.

The agitation to impose a rule of absolute liability in aviation cases would seem to begin in this country with the case of *Gulle* v. *Swan*.[39]

2. A rule of absolute liability, but with the defense of act of God or *vis major* available.

3. The ordinary rules of negligence and proximate cause, applicable to torts on land and liability, based entirely upon fault or negligence.

The modern attitude is to apply the general rules concerning torts on land to aviation cases also, where the accident happens on the ground.[40] There is no good reason why the owner and operator of an aircraft should be charged with any higher duty to exercise what amounts to reasonable care under all the existing circumstances in each case than the operator of a motor vehicle.

The previously discussed doctrine of assumption of risk must be considered in connection with those cases where aircraft have inflicted injuries upon person or property on the ground at an airport. The Courts hold[41] that a person who voluntarily enters upon a recognized landing area assumes certain risks of bodily harm from airplane accidents. We also find holdings by Courts that where a collision occurred between an airplane and an automobile prudently driven on a public highway, the doctrine of *res ipsa loquitur* raises a presumption of negligence on the part of the airplane.[42]

As of May first, there had been thirty bills on aviation law and liability introduced in the 80th Congress.[43] As aviation is becoming more prevalent in litigation, we who are interested in this phase of the law, and especially the younger lawyers should study these proposed bills and let our representatives know our best thought as to each one. In a few years, when a case comes to the office, it will be too late if unfavorable laws have been enacted and through judicial decisions their interpretation has been crystallized.

36 Cohn v. *United Airlines*, 17 Fed. Supp. 865.
37. *Bratt* v. *Western Airlines*, 155 Fed. (2d) 850.
38. "The Doctrine of Res Ipsa Loquitur" in Aviation Law. By Howard S. Goldin, *Southern California Law Review*; December 1944; page 125.
39. 19 Johns 381; 10 Am. Dec. 234; 1928 Av. Rep. 53.
40 *Gruenke* v. *North Am. Airways*, 201 Wis. 565; 230 N. W. 618; 1930 U. S. Av. Rep. 126.
41. *Prokok* v. *Becker*, 345 Pa. 607, 29 Atl. (2d) 23.
42. *Sollak* v. *State of New York*, 1929 U. S. Av. Rep. 42.
43. Perhaps one of the most important bills introduced is S. 1 by Senator McCarran and H. R. 1699, by Mr. King, which identical bills contain 175 pages and would "create an independent C. A. A., on independent Air Safety Board, promote development and safety, provide regulations of civil aeronautics and promote world leadership by the United States in aviation."

The "Police State" vs. the Free State

■ The moral issue is the issue of the free state as against the police state.

A police state is a state where a few who control the police power proclaim a pattern of political, social and economic life and then use the police power to perpetuate it, detecting and crushing all who do not conform to their pattern.

A free state is a state where the police power is used to protect the right of individuals to think, believe and persuade in accordance with the dictates of their mind and conscience.

The philosophy back of the police state is materialistic, that men will be more peaceful and secure if, like domesticated animals, they are cared for, herded and driven in accordance with some superior human will.

Back of the free state is belief in a God who endows men with certain inalienable rights which none can justly take away and which none should want to take away because cooperation which admits of diversity produces richness far beyond that of enforced conformity.

—From an address in June by John Foster Dulles, of the New York Bar.

14

Admissions to the Bar:

Pennsylvania Debates County Restrictions

■ With many thousands of young lawyers returned from the war and re-establishing themselves in their profession, and with thousands of young men and women coming from law schools and engaged in the quest for placement, the requirements for admission to practice have become a matter of interest and concern to them. To an extent probably greater than in pre-war years, the graduates of law schools prefer not to return to the communities, or even the States, where they were born or where they lived at the time they went into the Armed Forces or away to college and law school. In many instances, their inclination is to make their venture in another State. Along with this migratory disposition goes the fact that most of the present newcomers have already married and so are under unprecedented necessities for establishing themselves as quickly as possible in localities and connections where they can make a living for themselves and their families under the present high subsistence costs.

The resulting conditions are receiving the thoughtful consideration of the judges, law teachers, Bar examiners, and members of State and local Bar Associations in more than a few States. On one hand, there is a natural disposition on the part of the States and localities to avoid an overcrowding of their Bars and to avoid competitions that detract from good service to clients and the public and deny an adequate income to many of the younger men. On the other hand, there is a solicitude that the doors of hope and opportunity shall not be closed or made unreasonably difficult of access for candidates who have worked hard and sacrificed much in order to bring themselves to the threshold of their chosen profession. As they have been permitted to enroll as law students, spend years and resources in law schools, and qualify themselves for admission, it is urged that they should not be at this point debarred by undue or arbitrary restrictions on the privilege of practicing law.

Conflicts between these sometimes opposing considerations came to grips in the June 30-July 3 meeting of the Pennsylvania Bar Association at Atlantic City. Earnest debate and a close division in the voting resulted. In Pennsylvania, passing the Bar examination and being admitted to practice before the Supreme Court of the State does not entitle the applicant to practice law as of right in any county or locality of his choice. He still has to be admitted in the particular county; and local restrictions are in many instances interposed as to length of prior residence in the county, the number of lawyers admitted in any year, residence and maintenance of an office in the county after admission, etc. A determined effort to align the State Association on the side of removing or relaxing some of these restrictions was made at the recent meeting, but the vote was against it. The following account will be read with interest by lawyers in many States, in some of which the present State-wide limitations are undergoing re-examination.

■ The Pennsylvania Bar Association's Committee on Legal Education and Admission to the Bar rendered the report which was the basis for the recent discussion. At the mid-winter meeting of the Association, the Committee had been instructed to make "a survey of the rules presently in force in the various counties of Pennsylvania relating to limitations on admission to the local Bar, including residence requirements and any other rules which operate to prevent a person who has been admitted to the Supreme Court of Pennsylvania from appearing in a County Court or otherwise practicing law within a county." Information was received by the Committee from fifty-nine County Bar Associations; eight county associations did not respond. The report of the Committee accordingly dealt with the situation in fifty-nine counties as contrasted with the rest of the United States.

The Association's Committee consists of fifteen members—five from the State Board of Law Examiners, five from the Association's general membership, and the Deans of the five law schools in the State. The Chairman of the Committee, Laurence H. Eldredge, of Philadelphia, chosen from the general membership, is a lawyer in active practice who has been a professor of law at the University of Pennsylvania Law School and at Temple University Law School, and has been twice visiting professor of law at Columbia University Law School.

The Report and Resolutions against the limitations on local admission were presented by six of the fifteen members of the Committee. In view of the fact that some of the questions raised in the report may have to be considered officially by the State Board of Law Examiners in the future, they did not participate in the presentation of the report. The five law school deans, namely, Dean Earl G. Harrison of the University of Pennsylvania Law School, Dean Judson A. Crane of the University of Pittsburgh School of Law, Dean C. Gerald Brophy of Duquesne University School of Law, Dean Walter H. Hitchler of Dickinson School of Law, and Assistant Dean Elden S. Magaw of Temple University School of Law, unanimously approved the entire report, including the proposed resolution. So, too, did Dean Benjamin F. Boyer of Temple University School of Law, who has recently been appointed Dean and had not yet been formally appointed to this Committee.

With respect to the Bar Association members of the Committee (other than the Chairman), none of them gave complete approval to the report. Judge Walter I. Anderson concurs with the entire report, with the exception of the recommendation "*entirely* eliminating *all* residence requirements." Judge Sara M. Soffel does not "support the resolution as drafted." Rufus S. Marriner, is "not in accord with the recommendations." Louis J. Wiesen, does not take any position on the report because he has not had sufficient time to study it and formulate his conclusions.

As published in the *Pennsylvania Bar Association Quarterly* for June (Vol. 18—No. 4), the Report refers first to the fact that "In each of the forty-seven States of the United States, exclusive of Pennsylvania, a lawyer who has been admitted to the Bar of its highest court has the privilege of practicing law in any State court within that State. He is free to settle anywhere he sees fit, hang out his shingle, and practice the profession of law. He is free to travel throughout the State and to appear in its courts in several or all of its counties. If he finds it desirable to move from the county in which he has established his office, he may do so and start anew in any other county at any time."

As to the situation in Pennsylvania, however, the Report says:

> Within the Commonwealth of Pennsylvania the fact that a person (1) has passed the State Board Bar Examinations, (2) is of the highest moral character, and (3) has been admitted to the Bar of the Supreme Court gives him the privilege to practice in that court—and little, if anything else. Under local rules of court, he cannot practice law in any one of the sixty-seven counties until he has been formally admitted to the bar of the courts in that county. Common Pleas judges have pointed to the Act of April 14, 1834, P.L. 333, § 68 (17 P.S. § 1602) which provides "The judges of the several courts of record of this Commonwealth shall respectively have power to admit a competent number of persons . . . to practice as attorneys in their respective courts" as giving them complete authority over the local county bar, and the power to impose any admission requirements they see fit to incorporate into local rules of court: *Smyths' Application* (C.P. Monroe, 1940), 40 D. & C. 98. That case also suggests that a member of the Bar of the Supreme Court, of the highest integrity, can be temporarily or permanently prevented from practicing law in a particular county on the sole ground "there now be a competent number of attorneys practicing at this bar."

Limitations on Local Admission In Pennsylvania Counties

In four counties (Butler, Delaware, Montgomery and Northampton) local rules provide that the judges annually or semiannually shall fix the number of lawyers who will be admitted to the Bar in that year. The rule is not presently enforced in Butler or in Northampton County. In Delaware County the number averages from two to four annually; in Montgomery, from three to six. The rule in the latter county says "The number of attorneys that may be admitted to the Bar during the calendar year shall be fixed by special order of the Court, on or before the first Monday of February. The Board of Law Examiners shall not recommend for admission more applicants than the number so prescribed." Generally there are more qualified applicants than the prescribed number. In that event the Board selects the candidates to be recommended and exercises its judgment in picking the candidates. In some exceptional cases in the past a candidate has waited two or three years, or more, to be admitted and watched applicants who applied after he did, get in ahead of him. Since 1940 a total of thirty-four lawyers have been admitted to the Montgomery County Bar. The President of that Bar Association writes, "The general rule is that applicants are admitted in the order of their application. This has been true with some few exceptions, and each exception was occasioned by unusual circumstances . . . which justified the exception." The Committee is also informed that in Montgomery County, up to the present time, the general policy has been to admit without substantial delay qualified lawyers who have returned from military service. The rule of the court provides that "Motions for admission to the Bar shall be made only on the first Monday of May and November of each year."

In thirty counties an applicant for admission to a local bar must have resided in that county for a period of from six months to five years immediately prior to being admitted, and in at least a few other counties, his lack of prior residence there will be a stumbling block to his prompt admission. Many of these residence requirements are of quite recent origin.

In six counties (Bedford, Berks, Erie, Lancaster, Lebanon and McKean) the 5-year-rule is now in force. (It is also the rule in Dauphin County with respect to lawyers previously admitted elsewhere who desire to live and practice in that county). A 5-year-rule is also under consideration in Northumberland County.

In eight counties (Chester, Columbia, Crawford, Greene, Montour, Washington, Wayne and York) the 3-year-rule is enforced; six others (Cameron, Clinton, Dauphin, Elk, Lycoming and Monroe) have a 2-year residence requirement; six others (Bradford, Fayette, Lehigh, Pike, Tioga and Union), a 1-year-rule; and four others (Adams, Cambria, Franklin and Westmoreland), a 6-months rule. In Lawrence County the Bar Association has recommended the adoption of a 1-year residence requirement.

A few counties require a clerkship to be served in that county: Beaver, one year; Lancaster, six months; Lehigh, six months; and Wayne, one year.

(Continued on page 966)

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Coordination of Taxes:

Tax Men Speak as to Who Shall Tax What

by **George M. Morris** • of the District of Columbia Bar

■ Who has not, at times, felt himself irritated with the apparent conflicts and confusion among the federal, State and local taxing authorities to whom he is responsible? Who has not wondered why we cannot get all these tax gatherers together and let them consolidate their bills, give us the bad news in one message per year, and permit us to budget and pay off as a single item what we owe?

If you have had such thoughts or are concerned with the machinery which brings in the fuel for government, you will be interested in the recently-released report on "The Coordination of Federal, State and Local Taxation." This document is the product of the Joint Committee of the American Bar Association, the National Tax Association, and the National Association of Tax Administrators. The report is written in words which those of us who are not familiar with the "trade terms" of the specialists can nevertheless grasp. Mr. Morris, the first Chairman of our House of Delegates and the first Chairman of the Section of Taxation has written for us a most readable summary and has soundly given the substance of the significant dissents.

■ There are high-lights in the Joint Committee's notable product. The majority says, in effect: "Taxes are made for governments; governments are not made for taxes." The Committee's thesis is that the coordination which everyone is seeking is not to be brought about by any revolutionary formula. As the report puts it: "The coordination of taxes is a continuing problem in every federal system of government, American and foreign." The solution, so far as there is a solution, lies in promoting the growing cooperation among both the legislative and administrative officers charged with tax programs and procedure.

Men of extensive and varied experience have participated in evolving the report. Henry F. Long, of the Massachusetts Bar, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, is the Chairman of each of the three Committees which join in the report. As Chairman of the combined groups, he brought to the task virtually a professional lifetime as a tax administrator of his Commonwealth. Others of the more widely known persons in the reporting group include Chief Justice Fred M. Vinson; former Assistant Secretary of the Treasury, Roswell Magill; James S. Y. Ivins, formerly of the U. S. Board of Tax Appeals; Carl H. Chatters, Controller of the Port of New York Authority; Charles W. Gerstenberg, tax writer and publisher; Mabel Newcomer, college professor of economics; Colin F. Stam, experienced head of the Staff of the Congress' Joint Committee on Internal Revenue; and Thomas N. Tarleau, former Legislative Counsel of the Treasury. State and municipal tax administrators, legislators, economists, and lawyers in active tax practice are also included in the twenty-seven members who have survived the long process of producing the Joint Committee's conclusions.[1]

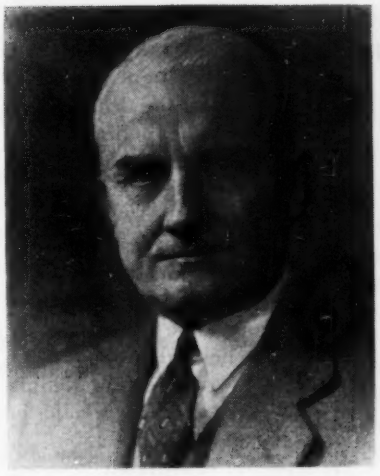
Numerous Minority Dissents Are Recorded in the Report

Since as far back as the creation of the Section of Taxation of the American Bar Association (1939), Commissioner Long has been the Chairman of that Section's Committee on this subject. Before that time the National Tax Association had been actively discussing coordination. Many of the Committee's members in the war years were absorbed in emergency activities. This pre-occupation prevented the earlier publica-

1. The members of the Joint Committee are: For the *American Bar Association:* Henry F. Long, *Chairman,* Charles F. Conlon, Mortimer M. Kassell, Fred M. Vinson, Roswell Magill, Seth T. Cole, Robert C. Brown, Rollin Browne, James S. Y. Ivins, Thomas Witter Chrystie; for the *National Tax Association:* Henry F. Long, *Chairman,* Carl H. Chatters, Fred R. Fairchild, Charles W. Gerstenberg, Clifford Goes, Welles A. Gray, Clarence Heer, Mabel Newcomer, Dixwell L. Pierce, Carl Shoup, Colin F. Stam, Thomas N. Tarleau, George H. Watson; *for the National Association of Tax Administrators:* Henry F. Long, *Chairman,* T. M. Jenner, Forrest Smith, A. H. Stone, C. Emory Glander.

ion of the ideas which slowly took shape in the many formal and informal discussions and written exchanges among the group's members. Four of the original members of the Committee—Farwell Knapp, Franklin S. Edmonds, Mark Graves and Harold D. Smith—died in the period between their appointment and the release of the report.

On certain points the Joint Committee was unable to reach unanimous agreement. Minority dissents are registered in the report; the presence of such disagreement gives assurance of the close application to the proposed recommendations which brought the majority to their conclusions.



GEORGE M. MORRIS

HENRY F. LONG

Basic Principles Recognized for the Coordination of Taxes

The basic principles recognized for the coordination of the taxing governments are stated to be:

1. The sovereign powers of the federal and State Governments must be preserved and not impaired (questioned by five members);

2. In general, each grade of Government should support its functions from its own independent revenue;

3. In general, the grade of Government which raises particular tax revenues should control their expenditure;

4. The primary purpose of taxation is the raising of revenue, and its use for regulation should be limited to those instances where such use is clearly warranted (questioned by two members).

Increasing Centralization Endangers Our Form of Government

One passage in the report stirs up a lively dissent. The majority says:

> In our opinion there is a danger in placing too much responsibility upon the federal Government for tax coordination and not enough upon the States. The consequences of tax coordination by federal revenue controls would be the further strengthening of the federal Government and the further weakening of the States. We realize that fundamental and popular centralizing forces have been at work since the founding of our democracy which have demanded an extension of federal authority. It is our earnest conviction, however, that if the trend toward increasing centralization is not substantially diminished, the survival of our democracy will be gravely endangered.[2]

Members Dixwell Pierce and Alfred H. Stone say the statement is too dogmatic, is only partially relevant, and confuses the issues of tax coordination.

Messrs. Cole, Gerstenberg and Stone say the statement in the report is far-fetched and that "The United States has managed to struggle along for more than a century and a half despite recurrent prophecies of doom and disaster." These gentlemen predict that the wisdom of our people will keep the Nation alive "under the Constitution a century and a half hence and thereafter."

Mabel Newcomer and Carl Shoup say: "There seems to be no evidence that such centralization leads to dictatorship. On the contrary, France and England had far more centralization of functions and finances before the war than did Germany." They favor increasing the total amounts of grants in aid.

Efforts to Achieve Efficiency and Lessen the Lost Motion

This disagreement among the Committee's members possibly reflects the conflict which arises from the desire, on the part of virtually everyone concerned, to achieve the greatest efficiency and the least lost motion in the assessing and collection of taxes. Collection and distribution of taxes, by a single authority—the federal Government, for example—would probably minimize conflicts in rulings, duplications of paper work and general irritation. This course is appealing. The advocates of such centralized control *believe* that abuses by the collecting authority could be guarded against, by proper legislation and inter-governmental agreements. As opposed to this there is a haunting fear, even among many persons striving for simplicity in levying and gathering taxes, that the power travels with the money. They are afraid of over-centralizing. They want, so far as is feasible, taxes collected by the authority which is to spend them; they want localized responsibility and authority.

The report of the majority of this Committee will not end the conflict; one suspects that the dispute will be interminable and will be reflected by surges, first in one direction and then in the other.

Specific Allocations of Taxes to Levels of Government

On the question of allocating certain kinds of taxes to different levels of Government, a device which has long been discussed, the Committee has proposals:

2. *Federal, State and Local Government Fiscal Relations*, Senate Document No. 69, 78th Congress, 1st Session, 1943.

The income tax may fairly be resorted to by both federal and State Governments. Federal collecting and State sharing are rejected. Coordination, not only between the States and the federal Government, but among the States, should be worked out through cooperation among the independent legislative and administrative bodies. Credits for individual taxes paid in another jurisdiction, fair allocations of business income (see, for example, *International Harvester Co.* v. *Evatt*, 67 S. Ct. 444, wherein the Supreme Court, in its most recent term, discusses the Ohio franchise tax apportionment formula), agreements on the tests for domicile (see *Greenough* v. *Tax Assessors of Newport*, 67 S. Ct. 1400, at the same term of the Court), and more uniform laws, are the tools for this purpose.

The Committee "believes that the States are entitled to the exclusive cultivation of the death tax field and urges the federal Government to withdraw its claims to this source of revenue." There are seven dissents to this conclusion. The Committee, with the same members dissenting, says also: "In the benefit of the States, whose laws govern the transfer of property, the federal gift tax should be repealed. Logically, gift taxation is a proper source of State revenue, and the States alone should tax gifts."

Gasoline Should Be for Taxation by States

Because the States have carried and should carry the primary responsibility for financing highways, the Committee would reserve the gasoline tax for the States. Such a tax by local governments should be discouraged. The States also "should have the privilege of imposing taxes upon aviation fuel that do not discriminate against interstate commerce", and this revenue "should be left exclusively to them". This brings five dissents. The Committee also feels that so long as State regulations do not conflict with federal, the States should be permitted to license for air transportation. There are four dissents to this. All of these proposals seem to be modified to the extent that the Committee proposes methods of cooperation among the taxing or licensing authorities which will ameliorate, in application, the proposed principles.

The Committee recommends that the States refrain from imposing tobacco taxes and leave this field to the federal Government. There are two dissents to this. If this proposal does not prove to be practicable, the Committee believes that the cooperation of the governments in administering the tobacco taxes should be studied and developed.

With respect to alcoholic beverage taxes, the Committee would have the States stay in but give credits for payment of similar taxes to other States and promote more uniform regulations, reports and bases. The federal Government should continue its excises but might well turn the revenue over to the States. One assumes that this is an instance of centralized collection and distribution to which the majority of the Committee would grant an exception.

General Sales Taxes Should Be Left for the States

The Committee (with one dissent) believes that both the federal and local governments should leave general sales taxes to the States.

The report commends "the tendency of the States to rely less and less upon property taxation and leave this to the local governments, but believes that administrative advice and supervision by the States is desirable. The State Governments should also assess public utility operating property, machinery, equipment, mining and other property which is employed in interstate business. Two members of the Committee believe that the recommendations of the majority do not meet the needs of the cities. It must be admitted that upon the face of the report the adequacy of the revenues for local use is not shown. On the other hand, the makers of the report have not undertaken to give a statistical demonstration of the merits of their proposals.

Nine Principles for Taxing Federal Property in States

What the States and local Governments should do as to taxing property belonging to the federal Government and located within the territorial jurisdictions of the States and local units is a problem which has steadily increased in importance for a number of years. The war-expansion of federal ownership has speeded up that growth. The Joint Committee suggests nine basic principles for dealing with the issue.

These principles, in summary, propose: (1) An up-to-date and complete inventory by the federal Government of its holdings; (2) An assumption that all governmental property, federal, State and local, should be taxed, with the burden of proof for exemption resting upon the proponents of exemption; (3) Taxation of federal property where similar State, local and privately-owned property is taxed—no exemption merely because the title to property in the process of sale by the federal Government rests in that Government; (4) Reasonable allowance for services performed by using the property of the federal Government which otherwise would be supplied by State or local Governments; (5) Extension of aid to particular activities through subsidies and not tax exemption; (6) States should represent the local governments in problems arising from the presence of federal property; (7) Conferences between federal and State representatives should develop the guiding principles for equitable treatment of federal property; (8) Payments by the federal government in lieu of taxes should be resorted to only where it is impracticable to determine what the taxes on federal property should be; (9) Federal, State and local business enterprises, such as electric utilities, should pay property and income taxes.

A Continuing Problem

The Committee suggests that the administrative and legislative branches of our Governments should

(Continued on page 968)

The Dispatch of Business by the Supreme Court

■ Charles Elmore Cropley, the Clerk of the Supreme Court of the United States, has supplied to the *Journal* two tables which show, respectively, the number of cases filed, disposed of, and remaining on the dockets at the conclusion of, during the October terms beginning in 1944, 1945, and 1946, and the data respecting the appellate cases disposed of on the merits during the October, 1946, Term lately ended.

DATA RESPECTING APPELLATE CASES DISPOSED OF ON THE MERITS AT THE OCTOBER TERM—1946

	No. of Cases
By written opinions—190 numbers consolidated into	140
Accompanied by dissenting opinions—96 numbers consolidated into	63
In which dissents were noted only—24 numbers consolidated into	21
Total number of cases accompanied by dissents—120 numbers consolidated into	84
Total number of cases disposed of by unanimous action—70 numbers consolidated into	56
By opinions *per curiam*—66 numbers consolidated into	55
Accompanied by dissenting opinion	1
In which dissents were noted only—13 numbers consolidated into	9
Total number of cases accompanied by dissents—14 numbers consolidated into	10
By unanimous action—52 numbers consolidated into	45
Total disposition of appellate cases on the merits at October Term, 1946:	
By written and *per curiam* opinions—256 numbers consolidated into	195
Accompanied by dissenting opinions—97 numbers consolidated into	64
In which dissents were noted only—37 numbers consolidated into	30
Total number of cases accompanied by dissents—134 numbers consolidated into	94
Total number of cases disposed of by unanimous action—122 numbers consolidated into	101
Total docket numbers shown above	256
Dismissed in vacation under Rule 35	1
Dismissed on motion of counsel	3
Total number of appellate cases on the merits (numbers) removed from the docket	260
Opinions announced in cases on the Original Docket	2

STATEMENT SHOWING

THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT THE CONCLUSION OF THE OCTOBER TERMS – 1944, 1945 AND 1946

	Original			*Appellate*			*Totals*			*Miscellaneous*		
TERMS	1944	1945	1946	1944	1945	1946	1944	1945	1946	1944	1945	1964
Number of cases on dockets	11	12	12	1382	1317	1512	1393	1329	1524	....	131	154
Cases disposed of during Terms	0	0	0	1249	1161	1366	1249	1161	1366	....	131	154
Number remaining on dockets	11	12	12	133	156	146	144	168	158		0	0

		Terms		
		1944	1945	1946
Distribution of Cases Disposed of during Terms	Original Cases	0	0	0
	Appellate Cases on the Merits	278	218	260
	Petitions for Certiorari	971	943	1106
	Miscellaneous Cases	...	131	154
Distribution of Cases Remaining on Dockets	Original Cases	11	12	12
	Appellate Cases on the Merits	86	102	95
	Petitions for Certiorari	47	54	51
	Miscellaneous Cases	...	0	0

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■ *Signal Victory as to the Hearing Examiners*

As this issue goes to press, word comes from Washington that our Association has won a substantial and highly gratifying victory for the public and the profession, in its efforts to have the qualifications, selection, status, and compensation of Hearing Examiners of the federal administrative agencies conformed to both the requirements and the purpose of the Administrative Procedure Act. This action by the United States Civil Service Commission on August 8 followed hearings before that body, at which the views of our Association were vigorously presented. Details of the Commission's action are given on page 861 of this issue. Issuance of the definitive rules will not take place in time for inclusion in our present report.

For this important sustaining of the intent and spirit of the Administrative Procedure Act for which our Association battled long in the interests of justice and fairness in the determination of agency cases according to law, great credit goes to the firm leadership of President Carl B. Rix, to the vigorous statement and emphatic warning given before the Commission by Sylvester C. Smith, Jr., of New Jersey, Chairman of the Section of Administrative Law, to the months of patient but insistent work by Carl McFarland as the non-governmental member of the Commission's Advisory Committee, and to others of the Section and the Association who helped to "hold the line" against evasion or weakening of the Act in its first crucial test. Appreciation also goes deservedly to Chairman Alexander Wiley, of Wisconsin, and members of the Senate Committee on the Judiciary, who took active interest in the matter at all stages and insisted that the Examiners be chosen for their impartiality and fitness.

The JOURNAL congratulates all concerned upon the commendable results secured, and is glad to have contributed its part through keeping our Association's contentions continuously before the Commission, the Congress, the profession, and the public.

■ *Welcome to Our Distinguished Guests*

The lawyers of the United States, whether assembled in Cleveland or at home in their offices, will welcome most heartily to America and to our Annual Meeting in Cleveland this month the honor guests who will give it an especial distinction. First among these is the eminent Lord Chancellor of England under its Labor Government, Viscount Jowitt of Stevenage, one of the most colorful and controversial figures in law and politics in the British Commonwealth of Nations. In a changing world and a revolutionized economic system in the United Kingdom and on the Continent, this holder of one of the greatest offices of tradition is also an embodiment of a changed order in the relationships of law and lawyers to society.

We welcome most cordially also the distinguished Chief Justice of the High Court of Ontario, who is the President of the Canadian Bar Association. Justice James C. McRuer has taken an active part in the cooperation between that Association and our own that has meant much for the World Court, for the Statute of the Court, and for the progressive development of international law. By reason of his friendships on this side of the border, "Jim" McRuer will be hailed and greeted as one of our own brethren of the bench and Bar of North America.

Our Association always is especially honored and fortunate when its Annual Meeting is attended and addressed by the Chief Justice of the United States. It will be so this month. Chief Justice Fred M. Vinson comes to this meeting in his new capacity for the first time. He should feel sufficiently "squared away" in his high post to speak frankly and authoritatively concerning the work of the Court.

Many other distinguished personages will be at this meeting—men from high positions in government, lawyers from other republics in the Americas, jurists perchance from The United Nations, although the re-convening of the General Assembly in mid-September has made it impracticable for them to count on coming. To each and all of the Association's guests, we extend most cordial greetings and hearty welcome, in behalf of our whole membership.

The Judicial Conferences in the Circuits

An institution that grows steadily in its significance and usefulness in the improvement of the administration of justice is the Judicial Conference conducted each year in each of the federal Circuits and the District of Columbia. Because the proceedings usually contain much that is of interest to lawyers in their practice, we obtain and publish a report of each Conference as soon as we can after it is held. This issue tells of the Conferences held in the First, Second, Third Fourth and Seventh Circuits. We expect that our October issue will contain accounts of the 1947 Conferences in the rest of the Circuits.

In many respects these Judicial Conferences in the Circuits are supplementary to the annual and special Conferences of Senior Circuit Judges, convened by the Chief Justice, of which for 1946-47 we gave full reports (February issue, page 118; June issue, page 571). At the same time, the Conferences in the Circuits retain considerable individuality; and it is interesting to note the diversities in their development under the Act which gives them formal status. The attendance usually of the member of the Supreme Court who is Circuit Justice for the Circuit, and of Director Henry P. Chandler, or one or more of his assistants in the Administrative Office of the Courts of the United States, together with close cooperation with the legislative and other committees of the Conference of Senior Circuit Judges, give practical usefulness and preserve some similarity in pattern.

Several of the Circuit Conferences have been signalized by addresses which, when published in the JOURNAL have attracted profound interest and provoked thoughtful discussion, in and outside the profession, throughout the country. Of this quality were the 1946 Conference in the Ninth Circuit ("The Higher Law", by Harold R. McKinnon, our February issue, page 106), the 1946 Conference in the Tenth Circuit ("The Layman and the Courts," by Editor Jack Foster of the *Rocky Mountain News* (our October, 1946, issue, page 621), and the 1947 Conference in the Fifth Circuit ("Opinions of Judges: Fifth Circuit Acts Against Unneeded Publication," by Francis P. Whitehair; August issue, page 751); and the panel discussion of the new Federal Court Claims Act, in the Fourth Circuit, reported elsewhere in this issue. It is notable that in successive months our leading article has been a useful product of a Judicial Conference. For the benefit of our readers, we hope for more of these.

In this connection, we refer to the fact that with the publication of the cover portrait and sketch of Judge Learned Hand of the Second Circuit in this issue, our coverage is completed of the Senior Circuit Judges and work of the Circuit Courts of Appeal in the ten Circuits and the District of Columbia. This has proved to be a most interesting and worthwhile series, if we can judge by the response from our readers. The sketches and portraits will have served well their purpose if they have given the lawyers of America a better acquaintance with the experienced and devoted jurists who preside over these great Courts and a better understanding of the high quality of justice which is administered in these Courts and of the industry and competence with which the work of the federal judicial system is carried on; also, if the series has heightened the realization, as a measure of justice to faithful public servants, that among the

Senior Judges and other Circuit Judges are many jurists of rich experience, sterling character, and tested impartiality and devotion to law – men who might well have been elevated to the highest Court of the land, to which they would have brought learning, independence, and fidelity to the American system of constitutional government. These men were not placed in their high judicial stations because they had served in the Congress or in the Executive branch of government. Their qualifications and fitness for the bench had been gained and demonstrated—with perhaps a single exception—through the best experience of all, the hard work and rigorous testing in active practice at the Bar, followed in several instances by service in a trial Court.

Each of these portrayals of our Senior Circuit Judges was prepared and published upon the responsibility of the Board of Editors, without identification of the authorship of any of them. Because of the marked diversities in style, treatment, and scope of the sketches, there has been much interest, even curiosity, among our readers as to who wrote particular sketches. Many men helped on them, in and outside the Board of Editors—judges, lawyers, law staffs of Courts. With perhaps a single exception none of the sketches represented or reflected the appraisal or the writing of an individual. Some of our most competent and best-known judges and lawyers collaborated on the material and the basic sketches, as their craftmanship showed. It was all a labor of love, that brought no recognition or acclaim of authorship; the final form and contents of each were determined by the Board of Editors.

Although our series, which began last November with Judge Orie L. Phillips of the Tenth, has now depicted all of the Senior Circuit Judges then in office, we shall not deem it closed until we have given in our next November issue a portrait and sketch of Judge Archibald K. Gardner, of South Dakota, the new Senior Judge in the Eighth Circuit, who succeeded Judge Kimbrough Stone when the latter retired from the bench in the month in which we published our sketch of him.

■ *Succession to the Presidency*

There is significance as well as appropriateness in the fact that, at a time when the world is rended by opposing philosophies of totalitarianism and popular government in either the parliamentary or the constitutional republican form, The President and the Congress of the United States have joined to change the order of succession to the Presidency when there is no Vice President and the incumbent of the Presidency dies. The purpose of the change is to ensure that the successor shall be an elected representative of the people rather than an appointee of the deceased incumbent.

The law had long provided that the Secretary of State, and other Cabinet officers in turn, should assume the duties of Chief Executive. "No President should have the power to appoint his own successor", declared President Truman. He recommended that the law be changed so that the Speaker of the House of Representatives and, after him, the President Pro Tem. of the Senate, should undertake the duties of the highest post. Mr. Truman proposed this when both of the ranking legislative offices were held by members of his political party; he renewed and stuck by his recommendation when they were held by members of the opposing party. Most of the legislators of his own party did not go along with him, but the change was enacted and his signature made it law.

The Speaker of the House was put first, because he is elected to Congress by the people of his district, every second year. The President Pro Tem. of the Senate is next in line, because he is elected to the Senate by the people of a larger unit, his State, but for a six-year term. This adherence to the elective principle is at the risk of a change in the political complexion of the Chief Magistracy. The probabilities are that the change in the law will have no practical consequences beyond the confirmation of this adherence to the elective principle, as against the idea that a Vice President in office as President might pick his own successor. Even that has significance in this testing-period for our form of government.

A somewhat related issue has been sent by the 80th Congress to the States and their people, in the form of a constitutional amendment for ratification or rejection. It would make a President ineligible for a third elective term. A Vice President who had succeeded to the Presidency could have two terms in his own right if he had not served more than two years under his succession.

Here is an issue which should be considered on its merits, in each State; and the lawyers should assist in bringing about a reasoned public opinion and action. Such an issue should not be decided, one way or the other, because of controversies as to any incumbent of the Presidency, but solely on the questions as to whether such a limitation will strengthen our republican form of government, will leave the voters with reasonable powers to do what is best for our country, will lessen any dangers of protracted personal powers, and will increase the opportunities and likelihood of the development of strong and experienced statesmen in both of the political parties, through leaving open to them a reasonable hope of being elected to the Presidency in their lifetimes.

In advance of this month's meeting of the House of Delegates, which may vote to place our Association on record as to the submitted amendment, we urge that the issues as to it be studied and discussed in every State, but we take no present stand as to ratification or rejection.

■ *The 161st Year of the Constitution*

Every year is a good year in which to note, think about, and talk about, the anniversary of the signing of the Constitution of the United States on September 17, 1787. The 160th anniversary of that great event has been singled out for special commemoration this month and during the coming twelve months. Our Association and many of its members will take part in the observance.

On September 17 special exercises will be conducted in Philadelphia to commemorate the anniversary and start the Freedom Train on its journey to all parts of the United States, as a part of the American Heritage Program. About 100 original documents of American history, including the Declaration of Independence, a draft of the Constitution with George Washington's annotations, etc., will be taken in this traveling shrine and exhibited to the people in all of the States, over a period of about a year. New England cities will be first.

A Community Re-dedication Week will be conducted in each locality visited, with special days, including a Bench and Bar Day. The purpose will be to reawaken interest and belief in the principles and practices of our republican form of government by the people. The American Heritage Foundation will be in charge; patriotic organizations, public officials, public schools, churches of all faiths, radio stations, etc., will contribute to the programs. Members of our Association will be looked to for many of the patriotic addresses.

Departments of State and National Governments, and public minded organizations plan special features to bring home the lessons. The Congress has authorized, and the Post Office will issue and vend, a special sesquicentennial stamp, bearing a Ship of State as a familiar symbol of our form of government.

Most appropriate in this year of new consecrations to the form of government ordained by the Constitution is our Association's creation of a distinguished Special Committee on the Rights of States and the preservation of the American federal system. In no other respect has our constitutional system been subjected to such strains and impairment, to an extent that may endanger the efficacy and durability of the whole structure. Steps will have to be re-traced and essential features of the federal system restored, unless our federal republic is to remain weakened from within.

With the cooperation of all patriotic citizens, a careful avoidance of political or factional significance, and a fighting purpose to preserve unimpaired the principles of the Constitution and the freedoms which it vouchsafes to our people, the 1947-48 commemoration of the anniversary of the signing of our Constitution should enkindle new faith, loyalty and devotion.

Editorial — From a Member of Our ADVISORY BOARD

■ *A New Judicial Frontier?*

Southwestern history resounds with stories of Judge Roy Bean. The nearest saloon served as his courtroom and the occupants as his juries. Offenders were tried, sentenced and punished as suited his whim or fancy. His word was law, his decisions unrestrained, and there was no appeal. His Court did possess a pretense of legality and a degree of dignity. His self-instituted Court was the forerunner of the enforcement of law by Courts of justice in the Southwest.

Military Commissions of today may similiarly be the forerunner of an international law and the enforcement thereof by Courts. Recently, however, the press reported that two British soldiers were executed by a Military Commission in Palestine, "because they were convicted of being enemies". Specifically they were charged with "illegal entry into Palestine", "illegal possession of arms", and of being members of the British occupation force.

By what authority has it become a capital offense to be an enemy, or for a soldier in uniform to be armed, or for these soldiers to accompany their army into Palestine? The truth is these soldiers were executed in reprisal for acts performed by the British Army, acts over which the executed soldiers had no control and in which they did not participate. The Geneva Convention forbidding reprisals against prisoners was ignored. Japanese Military Commissions tried and executed many American airmen because U. S. bombs were dropped by other planes on areas which they (the Japanese) determined were non-military. American Commissions are still trying and convicting Japanese for acts over which the individuals may have had little or no control, and for offenses heretofore unknown.

Such reports clearly demonstrate that Military Commissions are untamed, unrestrained; they determine their own bounds. But from the saloon Courts of Judge Bean came the respected Courts of today's Southwest. We may hope that these untamed Military Commissions, after they get plenary recognition of their existence and power, may likewise be restrained and controlled within legal boundaries and become truly Courts of justice, adhering to and enforcing just and recognized rules of law.

CHARLES R. FELLOWS
Tulsa, Oklahoma

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Editor to Readers

■ "We all have our dreams, and they don't take up much space," said the benign Mrs. Marsans in Arthemise Goertz's current novel of kindly living, *Give Us Our Dream*. We shall take the space to tell some of our "dreams" for our Association, which its members and their clients can help to make come true, for the future of America. First let us remind that years ago a selfless, high-minded lawyer in Los Angeles, a Circuit Judge of the United States, faithful in his interest in our Association but never seeking prominence in it, had a "dream" for the Association and for public opinion in America. So in his will he wrote a testamentary bequest from his modest earnings of a lifetime, in favor of the Association as trustee, the income of the fund to be used to establish and maintain the Erskine M. Ross Prize for the best discussion each year of such subject as should be selected in aid of an informed public opinion in his beloved country. So from year to year the benefaction of this devoted American has produced a series of notable essays on vital subjects, of which the 1947 prize winner is in this issue. As long as our Association endures, the thoughtful testamentary provision made by Judge Ross will perpetuate both his memory and his "dream" as to what our Association can help do for our country.

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Similar opportunities abound today, and are enhanced and multiplied by the great upsurge in the usefulness, prestige, membership, and indispensability of our Association. "We all have our dreams" for it; but we place two things first, between which choice can be made by any and all who will help "give us our dreams." Our Association and its expanded work have long and far outgrown the remodelled residence which is its Headquarters in North Dearborn Street, Chicago. Our work and our prestige suffer from the lack of an adequate, well-planned and well-equipped office building, such as other professional associations have, such as labor organizations have acquired, and such as have been given to numerous other organizations of less public importance than our Association. Proceeds of sustaining membership dues are being set aside for a building fund; but accumulation from that source is too slow a process. Could any lawyer or any client who consults him as to desirable objects of testamentary gifts, put money to a better use than to help provide our Association with a building which would be adequate for its work, would be a reason for pride on the part of its members, and would symbolize to all people the permanence and the public importance of the purposes for which the Association mobilizes the skills, the disinterestedness, the public spirit, and the forward looking vision of the lawyers of America? The New York County Lawyers Association, largest of local Bar Associations but with a membership which is one-fifth of ours, has a commodious building, a few doors from Broadway and the City Hall plaza; it was made possible by the gift of one lawyer. We state a personal angle: Should the JOURNAL go on being issued from a third floor attic?

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We take the space to state another "dream" which would be an equally worthy object of benefaction. Oftentimes a need arises that our Association shall undertake some major project of importance to the public or the profession, which cannot be financed from the proceeds of annual dues. A militant Association needs an endowment fund to carry forward its fighting causes. Generous and public-spirited as have been those who hold the purse-strings of the great Foundations, our Association should not have to turn to them for grants-in-aid of vital work. Within the past year, when our Association decided it should undertake comprehensive work as to the progressive development of international law, and again when a Survey of the Contemporary Profession was deemed to be imperative, the Association had to obtain the help of the Carnegie Endowment, to supplement the funds which our Association could spare for such purposes. Of course, the donors of such grants-in-aid attach no "strings" to their appropriations; once the public importance of the project and the soundness of the Association's plan for it are established, the money is placed at the disposal of the Association, to carry on the work in its own way. But the lawyers of America should have an endowment of their own funds, to enable them to fight with all their might to maintain the free institutions of our republic and the supremacy of impartial justice under law. Could any American, lawyer or other citizen, leave behind him a more suitable and lasting memorial, in appreciation of the opportunities which he has enjoyed under the American way of life? Many clients should be grateful to their lawyers for such a suggestion. The American Bar Association Endowment, a corporation chartered under the laws of Illinois, with Jacob M. Lashly of St. Louis as President and Reginald Heber Smith of Boston as Treasurer, is the ready vehicle for such purposes. But the officers of the Endowment were not consulted as to the above statement "on our own".

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Those who were concerned lest the selection of documents for the Freedom Train of the American Heritage Foundation, due to start from Philadelphia this month on a year's tour of the country, would be utilized for partisan or ideological propaganda, will be reassured by the information that the Senior Former President of our Association, John W. Davis, and John Foster Dulles, both of New York, are on the committee which will decide what documents shall be taken to the country. It

had been charged in the Congress that the preliminary choice had included highly controversial and divisive documents of the past fourteen years, the historical significance of which cannot as yet be appraised. No document should be exhibited which will not be looked on with reverence and true historic interest by all Americans, irrespective of party or locality.

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Members of our Association will be pleased to know that the beloved Sir Norman and Lady Birkett, who were honor guests at our Atlantic City meeting last autumn, arrived in Canada with their son Michael about August 1 and went directly to Western Canada for the month. They will return to Ottawa on September 2, to attend the annual meeting of the Canadian Bar Association on September 3-6, at which Sir Norman will be the guest speaker for the Bar of Britain. After a few days in Toronto, the Birketts will come to New York and sail for home on September 12. American lawyers will miss the opportunity of greeting them again, and hope that their brief visit to America is restful and enjoyable to the utmost.

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In our July issue (page 698) we told the manner in which inventive science is helping to overcome the difficulties of language and the delays of consecutive translations, in the sessions of organs of The United Nations and of committees created by its General Assembly. Our description was of the complex direct-wire, "fixed-post", simultaneous translation system used in the Committee as to International Law. Now a short-wave radio system enabling simultaneous translation and listening in any of the five United Nations languages is being tried out in the Economic and Social Council's chamber at Lake Success. Delegates and others place one-pound, battery-powered radio receivers on their chests, suspending the sets by straps from their necks. With this device, they can roam around at will and still hear any speech in whatever of the five languages they choose. The simultaneous-interpretation service now has 350 sets, which is enough for delegates, the press and some of the accredited representatives of the public. But others in the chamber may have to become proficient in more than one language.

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Copies of the War Department pamphlet on Communism, quoted from on page 743 of our July issue, "The Army Makes It 'Official' ", can be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., at five cents per copy. The requests should be for *Army Talk 180—Communism in the United States.*

In connection with S. Price Gilbert's delightful sketch of the late Chief Justice Bleckley of Georgia, we recall that his gracious and gifted granddaughter, Miss Katherine C. Bleckley, is now the popular and very efficient Clerk of the Supreme Court over which her grandfather once presided. Speaking of her illustrious grandparent not long ago, she recalled the difficulties he had in obtaining clothing that would fit his towering six feet, five inches, of stature. All of his "Prince Alberts", and practically every other garment, had to be made to order. He once was asked as to the size of shoes he wore. He replied: "Elevens, but twelves fit me better". At the time his second resignation from the Court dramatized the need for more than three Justices, the Court was docketing a thousand cases a year—an impossible burden for a Court of three members. At the next election, the State Constitution was amended to increase the number of Justices to six. Miss Bleckley is expected to attend our Cleveland meeting this month.

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The mid-season drive of the St. Louis Cardinals from last place to catch the heels of the fast moving Brooklyn Dodgers in the National League must have been too vividly in our mind when we wrote the sketch of Congressman Albert L. Reeves, Jr., of Kansas City, Missouri, on page 711 of our July issue. We said that he had been elected to Congress last fall from the district "long represented by Enos Slaughter." Jules Q. Strong, of St. Louis, a member of our Association since 1931, and evidently a "fan" on baseball as well as law and politics, picks us up on this. "I have long been under the impression", he writes, "that Enos Slaughter has represented a baseball district known as the St. Louis Cardinals. The Enos Slaughter of the St. Louis District has never been known to lose an election. In fact, his constituents have been known to consistently give him a great plurality of votes. I do have some recollection that there was a representative named Roger C. Slaughter who represented a Kansas City District long before Enos Slaughter was representing the St. Louis District of the St. Louis Cardinals. Perhaps your writer has been dazzled by the brilliant representation rendered by Enos Slaughter and decided that all Slaughters should be Enos. Maybe this notation in the JOURNAL is intended to be the forerunner of a sports section therein, or could it be your slip is showing?" P. S. It is.

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Our members can hardly have missed the significance and the reassurance of the fact that in successive years (1946-1947) the winning Ross Prize Essay on a subject of vital public importance has been won by a younger lawyer, a member of what is for the sake of continuity but none too descriptively called our Junior Bar, a returned veteran of World War II. They contributed "the best discussion" in their respective years, against the competition of many of their seniors in experience

as well as age. In its younger men the organized Bar has great resources, a veritable reservoir of ability, industry, and eagerness to help do the right things. These younger men are bound to take over many tasks from those who have borne the burdens perhaps too long. In many committees and projects of our Association the younger men are being moved in. In the JOURNAL several members of the Junior Bar, including this year's Ross Prize winner, are valued members of our Advisory Board; and last year's victor is a member of the Board of Editors. Lately, these young men looked on "the bright face of danger", and did their stint; now they do not flinch from tackling problems which baffle their elders who have tarried on "the home front". At the conference with representatives of the radio, newspaper and motion-picture industries, reported in our July issue, Chairman James D. Fellers and W. Carloss Morris, Jr., of the Junior Bar attended, and then went out to mobilize manpower of the Junior Bar in the campaign against juvenile delinquency and for the better presentation of the usefulness and dependability of our profession to the public. Our Association will gain mightily in strength and capacity, and its sound look forward, as the younger lawyers returned from the war, members or alumni of the Junior Bar Conference, are brought to the fore in our work and counsels. Our contributed editorial this month is by one of our younger lawyers on our Advisory Board, as was that by Edwin L. Luecke, of Texas, in our June issue.

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The National Association of Radio Broadcasters, of which Former Judge Justin Miller is President, has initiated a campaign to lessen juvenile delinquency, in furtherance of the objectives discussed in the conference convened by our Association with representatives of the radio, press, and motion-picture industries in June (see our July issue, page 649). The American Bar Association, through those who represented it in the conference, is one of the participating group. The diversified radio programs formulated by the National Association of Broadcasters have been tried out, with favorable results, by several stations. A large number of stations are expected to take part in presenting these programs which are designed to be attractive to the young and to be helpful toward overcoming tendencies toward juvenile delinquency. Our Association's efforts in this field, on the initiative of the Section of Criminal Law, is thus meeting with a response in the form of tangible correctional steps.

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Perspective as to our own problems of education and training for law and public service can often be gained by examining others' experience. Socialist Foreign Minister Ernest Bevin, plain-speaking exponent of economic and social theories which are at war with the system of class education exemplified by the British "public" school, Oxford-Cambridge type, was recently called on to answer a parliamentary question for an analysis of the educational background of the new recruits to the United Kingdom's foreign service under the Labor Party's administration. The response, obviously confirming the superiority of an educational system which Mr. Bevin detests, showed that even the levelling processes of British socialism have not broken down the standards of preparatory training in order to bring political henchmen or starry-eyed radicals into the British foreign service.

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The majority of the candidates admitted to the British foreign service since hostilities ended have been under 30 years of age. Only thirty-five of 154 were older. All but ten had been trained in the "services" in the schools. Among the schools, Winchester led with fourteen successful candidates. Eton had nine, Rugby six, Dundle and Stowe four each. Oxford produced fifty-five of those chosen; Cambridge, forty-seven; the University of London, only seven; all of the English provincial universities together, but two; Scots and Commonwealth universities one each. Only six of the new recruits have no university degree. There was no bias on the part of the examiners. Indeed, there is left no opportunity for personal bias or political favoritism in the post-war civil service examinations, nor for prejudice in the interviews. Premium is put on vigor, imagination and initiative, strongly based is sound character. In such a competition, these qualities seem to be developed best in the sharply criticized "public" school and the old universities of Britain. Those responsible for the selection of men for the American foreign service may well note and emulate the British Labor Party's resolute adherence to non-political standards of training and fitness.

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Those who are concerned in improving military justice and have access to libraries that receive British periodicals will be interested in reading an article by J. A. G. Griffith on "Justice and the Army," in the *Modern Law Review* for July (page 292). It deals with the basis for the demand, apparently heard often in England, that there should be provided an appeal to the High Court of Justice from courts-martial convictions, at least in major cases. The article is a good measuring-stick to see how conservative and restrained were the report and recommendations of the U. S. War Department's Advisory Committee nominated by our Association.

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The Abraham Lincoln Association, First National Bank Building, Springfield, Illinois, solicits information concerning the present private ownership and location of any document composed by Abraham Lincoln, whether or not it has been published hitherto. The preparation of a complete edition of Lincoln's writings from original sources will be thereby greatly facilitated.

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

■ Many of our readers will be pleased that we are able to receive again and publish the *London Letter*, largely suspended during the years of war. Written for us by the gifted H. A. C. Sturgess, Librarian and Keeper of the Records of the Middle Temple, it has helped to keep a sense of the kinship of the lawyers of the two lands, with an awareness of their common problems. We shall hope hereafter to publish the *London Letter* in alternate issues.

Lawyers of America feel that they are beset with difficulties due to oppressive taxes, bureaucrats, living costs, unbalanced economy, ascendancy of Left Wing "pressure groups" in political power, inroads of collectivist and positivist philosophies of law, throttling and absorption of the functions of enterprise by government. Yet we find that our brethren of Britain are struggling against the same factors, many of them in aggravated form; and that they have to cope also with more elemental deprivations—great damage to the Inns by enemy action, destruction of law libraries, loss of legal papers and office records, utter wiping out of business concerns which were valued clients.

Yet the Inns, the Law Society, and the lawyers of England "carry on" with an undaunted spirit which should prevail here too. The message of Her Majesty the Queen, quoted in this *London Letter*, will awaken a response in America, even as the stirring address of R. C. Stovall, of Mississippi, elsewhere in this issue, reminds how great is our debt to Britain for the immortal principles of freedom under law.

■ Two notable events in the Inns of Court since our last letter was published are those of the building and the opening of the new temporary Library of the Middle Temple. This new Library stands on the site formerly occupied by Nos. 2 and 3 Brick Court, which were totally destroyed by enemy action. The foundations of those two buildings were cleared of rubble and converted into an emergency water tank during the war. This tank, having been properly cleaned and dried, now forms a basement to the new Library, which has been built across it; and many thousands of books are stored there. The building, designed by the Inn's Surveyor, covers an area of more than 3,000 square feet and contains, in addition to the working Library, a common-room for the use of Members of the Inn, together with kitchen, cloak-room and staff rooms.

By a judicious arrangement of the book cases, all of which have been constructed from material taken from the old Library, it has been possible to have nearly 30,000 volumes available for immediate reference and to secure accommodation for between seventy and eighty readers. Ninety per cent of the material used in the construction of the building was obtained from buildings which had been destroyed, and from the old Library. It cannot be claimed that the exterior appearance is beautiful—in these times beauty must be sacrificed to utility—but a high degree of interior comfort has been attained.

Opening of the Temporary Middle Temple Library by The Queen

Her Majesty the Queen, who is a Bencher of the Middle Temple, graciously consented to open the new temporary Library on last November 21. For the occasion, it was essential that the famous Hall should be made available for the reception of guests and Members of the Inn. By dint of much hard work this was done, but it will be a long time before complete restoration can be carried out. On her arrival at the Benchers' entrance in Middle Temple Lane, Her Majesty was received by the Master Treasurer, W. Craig Henderson, K. C., and Master Lord Athlone, and was escorted to the Benchers' Smoking Room, where guests and some fellow Benchers were presented. The company then proceeded to the Hall, where a large number of Benchers and Members of the Inn were awaiting them, and where the Treasurer opened the proceedings by a short address, in which he expressed the appreciation and grateful thanks of the Inn to Her Majesty for so kindly sparing the time to open the new temporary building which must house the Library for some time to come.

Her Majesty, in reply, warmly thanked the Master Treasurer for the welcome spoken on behalf of the Members, and said she was very glad to be present on this happy occasion. After referring to the damage suffered in the war, Her Majesty continued:

> I think that we can say that a Library of books of law provides a picture of history and of man's progress. Our Library contains a wide and comprehensive range of books concerned with law in many countries besides our own. In the pages of these books we can read of the struggle between force and law, fought nowhere more strongly, from the earliest times, than in this country. The concepts of the Rights of Man have established themselves as legal principles, and the supremacy of the Courts has shielded and fortified their existence.
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> The Rule of Law means the supremacy of Law, yet it is the servant of Society, not its master. It is not rigid nor unchanging. The influence of custom and adaptation lend to it an "indwelling and creative principle". The evolution of our Common Law, with which I believe our Inn has been particularly associated, provides just that union of firmness and flexibility which admits the supremacy of Law, and prevents its tyranny. The restraining power of Law guards the principles of the past. Its administration by enlightened men moulds those principles to the spirit of the age.
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> But the rule of Law cannot survive of itself, nor be found only in statutes or legal text-books. It demands an

attitude of mind, a firm moral belief and a constant vigilance. We, in these days, must be as jealous of the sanctity of Law as those who in the past have upheld it. We must be prepared to maintain and extend their work, no matter from where the threat may come.

We have actually seen for ourselves the fearful fall of a nation which abandoned its principles and overruled its law. We may hope that some day the Rule of Law will ultimately govern all human relationships, without regard to the limitations of frontiers or states.

The forward march of Law has not, then, reached its goal. The books in our great Library are milestones along the path on which we have come and signposts pointing to the way ahead. In looking at them we can take heart in the history of our Justice and in the justice of our History.

Our Library is a memorial to the past, and a challenge for the future, and I have now great pleasure in declaring it open.

The Queen, accompanied by Masters of the Bench, then proceeded to the new building, at the door of which the Master Treasurer handed to Her Majesty a key made entirely of oak taken from a roof-timber of the Middle Temple Hall, which was so badly damaged by enemy action. With this key Her Majesty opened the door and entered the building, of which she made a tour in the company of the Treasurer and the Librarian, and showed a keen interest in all the arrangements which had been made.

Bar Students' Advisory Officer Is Appointed

The four Inns of Court have appointed Mr. John Lee to the post of Bar Students' Advisory Officer. His office is at 7 Stone Buildings, Lincoln's Inn, and his duties, which commenced on May 19, are: To attend to the general welfare of Bar Students, particularly students from overseas, while men are staying in London for the purpose of their studies, and especially to assist them in obtaining suitable living accommodation, as well as to advise them generally upon any matter of difficulty which may arise. For many years there has been urgent need for such arrangements to be made. Prior to the war, numbers of students from overseas secured lodgings in most undesirable neighborhoods and lived under undesirable conditions, simply because they had no knowledge as to whom to go for advice. The new Advisory Officer will not have an easy task. Suitable accommodation was difficult to find before the war; but, owing to the number of houses destroyed and the fact that so many people are looking for homes, those difficulties have been tremendously increased.

It was suggested recently that a special hostel for Bar students from overseas should be built; but in view of the lack of materials and manpower, it is unlikely that sanction could be obtained for its construction even if the money were forthcoming.

Protecting the Liberty of the Subject Against Legislative Encroachments

An important Bill was introduced in the House of Lords on April 24 by the Marquess of Reading. Its object is to strengthen the safeguards which protect the liberty of the subject against the misuse of statutory and other powers and to repeal or amend various legislative provisions whereby these safeguards have been weakened or undermined. In 1929, Lord Sankey, then Lord Chancellor, appointed a Committee to examine and report on the powers of Ministers. The Committee issued its report in 1932. The "Preservation of the Rights of the Subject Bill" proposes to carry out the unanimous recommendations of that report. The first clause provides that any Order or Rule which is required to be laid before Parliament may be amended in either House. At present such Orders have to be approved or rejected as a whole. This clause therefore proposes to establish more effective control over delegated legislation.

The restriction on the right of search by persons in the employ of Government departments is provided for in Clause Six. The Bill also seeks to protect employees of public authorities from dismissal for the reason that they are not members of a trade union. Where a Minister is empowered to adjudicate, and finally to decide, upon any claim or other issue any question of law, the Bill provides that there shall be a right of appeal to the High Court.

Under the existing law, actions may be brought against private persons within six years of the cause of action having arisen, but public authorities are in a privileged position. They cannot be made liable unless the action is commenced in England within twelve months or in Scotland within six months. Moreover, a person who unsuccessfully sues a public authority may be condemned in a substantially higher scale of costs than if the defendant were a private person. The Bill, if it were passed, would put an end to this anomaly. It was read a second time in the House of Lords with a majority of thirty-seven in favor to nineteen against.

Early in the year a List of Barristers returned from war service was compiled and circulated by the General Council of the Bar, with a view to assisting such Barristers in returning to their practices. The List was also circulated by the Law Society in the February number of their *Gazette*.

It has now been decided by the Bar Council to compile and circulate a Supplemental List of those members of the Bar who have suffered, or are likely to suffer, in their practice owing to war service. The period of war service qualifying for the Lists is defined as "complete severance from practice for a minimum consecutive period of three years terminating on or after the 1st January, 1945, owing to service in the Armed Forces, in Government service, or in other work of national importance." Consideration, however will be given to any exceptional case not falling within this definition. It is hoped by these means to make easier the path of many who have experienced great difficulty in recovering the status they previously enjoyed at the Bar.

"Books for Lawyers"

PRESIDENTIAL GOVERNMENT IN THE UNITED STATES. *By C. Perry Patterson. Chapel Hill: The University of North Carolina Press. August 9, 1947. Price $3.75. Pages ix, 301.*

This study to a large extent complements two books which I recently reviewed at length in these columns. In the first of the earlier volumes *(The President and Congress)* Dr. Wilfred E. Binkley,[1] with special attention to the growth of presidential leadership, traced the history of the relations between the executive and the legislature; he did not, however, make concrete suggestions looking to a change in that relationship. Mr. Estes Kefauver and Dr. Jack Levin, in their *Twentieth Century Congress,*[2] while including an exposition of the origin of many of the present rules and usages of Congress, did not extensively explore the historical background; they were primarily concerned with the formulation of methods of modernizing Congress and rendering it more effective.

Dr. Patterson's approach is historical but he is concerned not only with the President-Congress relationship but with all phases of the growth of presidential power, both constitutional and political, and with a remedy for what he considers its abuse. Indeed, he sets out to prove a declared thesis. That thesis is that we have become an unlimited democracy and that almost complete power has been transferred to the President, "not as constitutional executive but as political executive." His submission is "that responsible cabinet government is the best possible means in the absence of constitutional restraint to prevent the permanent establishment of irresponsible executive government." (page vi.)

The background chapters are of varying merit. It might have been more emphatically pointed out that the now complete triumph of the nationalists would not have been possible if they had not in the beginning obtained two successes: Acceptance of the doctrine of judicial supremacy, and control of the Supreme Court as the enforcing agency. If the doctrine of the Virginia-Kentucky Resolutions had prevailed or if Marshall had not been the nationalistic and forceful Chief Justice he was, our history would have taken a different course. Certainly otherwise Dr. Patterson could not point out that under the suzerainty of the present Supreme Court, constitutional limitations upon congressional and presidential action have become largely a matter of historical interest.

It is not so easy to accept Dr. Patterson's conclusion that this makes for the permanent hegemony of the President instead of Congress. If one considers potentialities, that does not follow from the record so far made. The Court—perhaps because it has had more opportunity so to do—has gone further in sustaining congressional than presidential powers. At long last it has sanctioned the Hamiltonian doctrine that Congress may tax and spend under the "general welfare" clause without being limited by powers expressly granted. It has not yet announced its acceptance of that other doctrine which Hamilton enounced and which Theodore Roosevelt is claimed to have put into effect—that the President possesses all power not forbidden by the Constitution.

It may well be that the power of the President has reached if it has not already passed its peak. Accepting Mr. Patterson's analysis of the forces that have caused the expansion of that power it seems likely that none of them will be more effective in the foreseeable future than it was in the immediate past and that some will lose much if not all of their potency.

Mr. Patterson lists the constitutional as opposed to the political powers that have given the President ascendency: the message, the veto, the power of appointment and removal, the war power, the right to negotiate treaties and make executive agreements. Some of these we need not consider. It is hardly debatable that a presidential dictatorship is almost necessary for the successful conduct of a war. The message has only such influence as the confidence of Congress and the people in the President gives it. Treaties must be ratified by the Senate. The making of executive agreements may become, if it is not already, an abuse. But, even if the Court fails clearly to draw the line between these agreements and treaties, Congress may still refuse to implement by appropriations or otherwise any arrangement of which it disapproves. Even the power of appointment and removal can be largely controlled by Congress; confirmation of appointments by the Senate may be increasingly required, terms may be limited and causes for removal specified.

The only one of these powers about which Congress can do nothing is the veto power. This power has greatly expanded. The framers of the Constitution thought of it as limited in scope and believed that it

1. See *The President and Congress*, by Armstrong, 33 A.B.A.J. 417, May, 1947.

2. See *A Twentieth Century Congress*, by Armstrong, 33 A.B.A.J. 674; July, 1947.

would rarely be used.[3] This, until recent times, was the practice of the Presidents. President Truman, however, in vetoing the labor (Taft-Hartley) and tax revision bills gave as his reasons only those which would have motivated him to vote against these bills had he remained a member of the Senate. In so doing he was not only within his rights but was acting in accordance with the modern conception of the function of the veto. The veto, however, is a shield, not a sword; it may stop legislation but it cannot compel action.

Dr. Patterson lists as another source of presidential power the administrative agencies. The present existence of this power cannot be denied, although recent legislation has lessened it. Here again, however, Congress is potentially in control. "Blank check" legislation may be eliminated; appropriations may be conditioned; confirmation of appointments may be required; supervision may be exercised.

Dr. Patterson's greatest disquietude results from the growth of presidential leadership. Here again he seems to overstate his case. The Presidents in our time who are credited with having formulated and secured the adoption of a legislative program are McKinley, Theodore Roosevelt, Wilson and Franklin D. Roosevelt. McKinley certainly did not seek to dominate Congress. He secured his results by personal influence—by tact and diplomacy. It was not the President but Uncle Joe Cannon who was responsible for the legislative program during the administrations of the first Roosevelt. Because of his effective control as Speaker of the House, Cannon was in effect Prime Minister and Roosevelt was satisfied with such legislation as he could convince Cannon was desirable. Franklin D. Roosevelt came to the presidency during a great emergency and because of that emergency and because of his engaging and forceful personality was able completely to dominate Congress. Only Woodrow Wilson, during his first term, successfully essayed the role of Prime Minister in anything approaching normal times. The splendid results he achieved furnish little argument against presidential leadership.

While I do not believe that the problem is as serious as Dr. Patterson seems to think, yet, if it were, his suggestions do not seem to me to be the solution. His idea is that the President should willingly abdicate all political power and become a mere executive. This he would accomplish by leaving the members of the Cabinet as now constituted as mere administrators and having Congress select from its membership another cabinet corresponding to the departments. This cabinet would supersede the President as political executive. While it would consult with the President it would itself formulate, initiate and sponsor legislation. It would supervise departments and agencies and require the resignation of administrators who failed to conform to its policy. If any of its major legislative measures was defeated a new congressional cabinet would be formed. If the Senate and the House were controlled by different parties there would be a coalition congressional cabinet.

There is not space to detail all the impracticabilities of this plan. Enough to say that it envisages a partial abdication of his powers by the President. If the White House is occupied by a weak President or by one who adheres to the orthodox Whig-Republican view that Congress has the responsibility for legislation, it will not be needed; on the other hand, no strong Democratic President would willingly promulgate such a self-denying ordinance.

Although I do not agree with many of Dr. Patterson's conclusions I do acknowledge that in making and publishing his study he has rendered a distinct service. The relation between the President and Congress poses one of our most pressing problems. If it is to be solved it must be by the crystallization of public opinion, for the politicians are not interested. Dr. Patterson has not only contributed to the factual basis for informed public opinion, but he has made challenging and provocative suggestions which should stimulate the continuance of the current highly desirable discussion.

WALTER P. ARMSTRONG
Memphis, Tennessee

I SPEAK FOR THADDEUS STEVENS. *By Elsie Singmaster. July, 1947. Boston: Houghton Mifflin Company. $3.50. Pages vi, 446.*

Ordinarily this department's reviews of legal biographies deal with the lives of judges and lawyers who, despite faults and foibles, had qualities of greatness in our profession and are acclaimed as conspicuous champions of principles essential to law and the rights of men. This review will be different. If a jury made up of our most objective historians were charged to examine the evidence and report the name of the lawyer whose public career was fraught with the greatest damage and danger to a united and enduring America, I have long been of the opinion that their verdict would return the name of Thaddeus Stevens (1792-1868), although some of us would have nominees of a much later generation. Stevens was a lawyer who became one of the most powerful, arrogant, unyielding leaders of his time—maligned undoubtedly by many of those who hated and distrusted him, followed fiercely by many who held fast to the rancors left by issues that nearly severed the republic—yet we see clearly today

3. Washington said: "From motives of respect to the legislature (and I might add from my interpretation of the Constitution) I give my signature to many bills with which my judgment is at variance." (page 50.) Hamilton, in arguing for a strong executive, declared: "The superior weight and influence of the legislative body in a free government, and the hazard to the executive in a trial of strength with that body afford a satisfactory security that the negative would generally be employed with great caution; and there would oftener be room for a charge of timidity than of rashness in the exercise of it." (page 51.) Jefferson: "The negative of the President is the shield provided by the Constitution against invasion by the legislature: (1) of the right of the Executive, (2) of the Judiciary, (3) of the States and State Legislatures . . . If the pro and con for and against a bill hang so even as to balance the President's judgment; a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases when they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President." (page 50.)

that it was he who had attached himself to what was destined to become a "lost cause", whereas Abraham Lincoln's counsels to "bind up the wounds" and reunite our country were certain to prevail in the hearts and minds of Americans despite Stevens' opposition and Lincoln's death.

Miss Singmaster has written ably in portrayal of Stevens as she would have others see him now. Her work has the zeal of advocacy together with the fruits of research, mostly in fields and localities already familiar to her. She resorts to "fictionalized" biography; she puts to paper, for her persuading, what you will recognize as Stevens' inmost thoughts at all stages of his life, although he made no record of them and their content is manifestly a part of her special pleading for a more kindly view of Stevens. Mingled with the author's imaginings is a great deal of detail and atmosphere, doubtless produced by research, which has bearing on Stevens' life only as background or environment and considerably slows the pace and impairs the unity of her portrayal of Stevens. Her narration shows little willingness to leave material in her files. Her method also leaves the reader in doubt as to what details are authentic and what are invented. Indeed, her whole narration leaves this reviewer in doubt whether she tried to create respect for Stevens by leaving the inference that he was right because it was all a mistake to permit the erring South to rebuild itself as a conservative force in the republic, or whether she sought mostly to instill sympathy for him because he struggled against the handicap of a deformed foot and because he never would marry and was kind and devoted to his mother who had been deserted by a worthless husband in Stevens' boyhood. All in all, Miss Singmaster's portraiture seems to lack the balance, if not the authenticity, of the biography written by the late Professor James A. Woodburn, to whom she acknowledged her debt.

Stevens' career is depicted in four localities — Vermont, Gettysburg (Pennsylvania), Lancaster, and Washington. Of life in and around Danville Center in the hill country of Vermont, Miss Singmaster gives or constructs a plethora of details. Her picture of Dartmouth College in 1811 is good writing. Research evidently revealed little as to Stevens' studies for the law, with "the smart Lawyer Mattocks". Stevens' pilgrimage on horseback to Pennsylvania to obtain admission to its Bar and to practise law, his shift from Lancaster to Gettysburg because he could not afford to wait out the one-year residence rule in Lancaster, and his early struggles to get a foothold in law and business (furnaces and forges) despite his aggressive views on the most divisive of issues, are well told. His announcement in the *Sentinel* read:

> THADDEUS STEVENS
> Attorney-at-Law
> Has opened an office in Gettysburg, in the east end of the Gettysburg Hotel, where he will give diligent attention to all orders in the line of his profession.

Recognition, success, and financial means, were finally but fiercely won. Politics absorbed his interest; he rode first on the Anti-Masonic issue, and played on the credulities and prejudices of many of the country folk in that era. Elected to the State Assembly, he took up the fight for public schools, and won a gruelling parliamentary contest. But if Miss Singmaster's chronicles of what he said and did are authentic, he made even that good cause singularly unappealing, according to the standards of those who today take its triumph as a matter of course. Headed for election to Congress, his vehement views and actions as to the slavery issue and as to fugitive slaves who made their way into Pennsylvania or nearby northern Maryland, divided his own race but earned for him the adulation of the colored race. Meanwhile, his success and standing in the law became such that he aspired to some high appointment, which never came.

In Washington, he rose rapidly to place and power, finally the Chairmanship of the Ways and Means Committee of the House, but he took with him his capacity for stirring rancors, even slanders, against himself. They never fazed him except as they might find their way to his mother in Vermont. With others of the new Republican party, he was shocked that, "thanks to the feebleness of Buchanan's Government," the country was "a hundred thousand dollars in the red. Heavy and unprecedented taxes must be levied —on luxuries, necessities, income— how otherwise repay the enormous sums which must be borrowed!"

With something akin to jealousy rankling in his breast, Stevens saw the 1860 contest for the Presidency narrow to William H. Seward and Abraham Lincoln and then Lincoln nominated and elected as President. "When he was a stripling I was opposing slavery. He's slow, he'll think there's time," is the thought Miss Singmaster ascribes to Stevens. Soon the latter was trying to force his hard policy on the President and the Cabinet. "He sets the pace for Abraham Lincoln" was the first slogan in Washington — music to Stevens' ears. War was never far from Washington; General Robert E. Lee and Jubel Early rode to Stevens' properties at Gettysburg and took his horses, provender, and buildings. Fields that were green with the crops in April ran with the blood of brothers in momentous July; the end of the war was in sight.

Then came a parting of the ways, division between Lincoln and Stevens; but Thad held to his retributive course. Lincoln was murdered, and Andrew Johnson of Tennessee took office as President. The increased scorn and fury of Stevens and those who held with him was turned on Johnson. The bitter fight for his impeachment and Stevens' part in it are brilliantly sketched. Johnson was left in office, but Stevens' Congress held the mastery—until Stevens died, too, and long afterwards, until Lincoln's counsels finally prevailed in the sober judgment of a reuniting Nation.

Despite her zeal, or perhaps because of it, Miss Singmaster does not seem to me to *explain* her hero. His views on slavery are not attributed to any spiritual or emotional resolve, such as came to the young Kentucky-born Lincoln in New Orleans. His fiery, unyielding views on various questions appear to have been rungs on the ladder to power, defiances that sprang from his spirit, and were not the products of any poised outlook on his time. The author seems not to suggest that Stevens was bitter and vindictive because he was crippled, although his lifelong purpose to succeed in spite of that impediment affected his character or at least his temperament. Perhaps he should have been assayed as merely and mostly the first American Radical in high place—born to intolerance and distrust of others' ability and character, bent perversely on having his own way and bending States and statesmen to his will—a lawyer whose "spear knew no brother." In any event, I put down Miss Singmaster's book with the feeling, contrary to her wish, that she has portrayed a man who gambled with the future of his country and put it in grave danger—but lost.

WILLIAM L. RANSOM
New York

THE RIGHT TO FLY: "A STUDY IN AIR POWER". *By John C. Cooper. Princeton, New Jersey: Henry Holt & Co., July 14, 1947. $5.00. Pages 380.*

Since the beginning of time man had envied the birds as they flew through the air. The early dawn of the twentieth century saw the realization of his age-old desire; and less than half a century later man's ability to fly presents international problems in war and peace which perplex the leaders of government and industry. The author deals not with individual rights and liabilities, but the complicated relationship between the inherent right of nations to fly and the control of their capacity to fly. He treats such subjects as, what constitutes national air power and national control of air space. He has compiled a record of international conferences and conventions dealing with the right to fly. The book is well documented and contains extensive quotations.

As a history of international negotiations, treaties, and agreements pertaining to aeronautical problems, both as the aftermath of armed conflict and in time of peace, it is quite complete with one exception. There is no reference to the Pan American Commercial Aviation Conference held in Washington, D. C. in the Spring of 1927 pursuant to a Resolution adopted by the Santiago Pan American Conference in 1926. This Washington Conference drafted the Convention which was adopted at the Pan American Conference in Havana in 1928. The Havana Convention, while referred to in the text, is not included with the other Conventions, which constitute approximately ninety pages of the appendices. Preceding these are some eleven pages of bibliography providing a ready reference to a wealth of source materials.

The rebirth of German air power between the close of World War I and the beginning of World War II is used to illustrate the close relationship between civil air power and military air power. The author reasons that no country which possesses the essential factors constituting air power can be effectively disarmed in the air if that nation is allowed to fly, even though limited to flights within its own borders and using such aircraft as are classified as non-military.

Against an excellent historical background of international diplomacy in the field of aviation, the author analyzes the present and potential air power of the Soviet Union, the United Kingdom and British Commonwealth, and the United States, the Americas, and the Pacific. He concludes with a strong and well reasoned appeal to make and keep the United States first in air power.

To one who had the privilege of presiding over the Pan American Aviation Conference in 1927 and to head the United States Delegation to the Paris Conference in 1929, this book served to recall many interesting debates on such questions as "freedom of flight", "the right of innocent passage", and "the four freedoms of air navigation". Its study by the representatives of this country who are responsible for our international air policy should be a "must". Anyone who is really interested in air power at home or abroad will find its reading worthwhile and thought provoking. The twelve charts depicting what the author terms "air penetration" from twelve important centers on the earth's surface are novel and deserving of careful study. Though one may not always completely agree with all the author's conclusions, his work is well done and represents a constructive contribution to one of the most important international problems of today.

WILLIAM P. MACCRACKEN
Washington, D. C.

THE NATURAL LAW. *By Heinrich A. Rommen. 1947. St. Louis: B. Herder Book Co. $4.00. Pages xi, 290.*

Many of those who dismiss natural law with a sneer or gibe as beneath contempt may merit commendation rather than censure. For the natural law they inveigh against is that brand which is identified with Spencerian sociological, atomistic, individualist *laissez faire* opposition to any attempt at improving social conditions by means of law. As humanitarians aware of profound changes in economic and social life which the law must recognize, they are exasperated by intransigeant glorifiers of the *status quo*. Or they think of natural law as that discredited rationalistic brand represented by those who once thought that human reason, operating in a vacuum divorced from reality, could by syllogistic processes and deduction construct legal systems complete to the last detail, leaving nothing

for positive law.

The great service that Dr. Rommen performs in this learned philosophical treatise is his clear exposition of scholastic natural law.

Dr. Rommen's book is the fruit of profound scholarship and bitter experience. Holding doctorates from the universities of Muenster and Bonn, he wrote *Die ewige Wiederkehr des Naturrechts* (of which this work is a translation and enlargement) while he was under police surveillance by the Nazis after being released from prison. In the original edition Dr. Rommen used the word "Bolsheviki" for Nazi, but all who read the book understood the true meaning. The Nazis forbade the advertisement of the book or its display in store windows, but now a second edition is coming out in German. A French translation was written in 1945 and a Spanish translation is under way at the present time. All this was because of his opposition to Hitler ideology. Getting out of Germany in 1938, he is now an American citizen—one of those refugee scholars from whom the United States is benefiting as the Western World profited from Greek scholars who fled the advancing Turk before the fall of Constantinople.

Notwithstanding the long-held view that natural law began with Grotius, it is as old as philosophy, as Dr. Rommen and others have pointed out. It is a consequence of the doctrine of the priority of the intellect over the will, the belief that law is reason in both God and man, in the knowability of the essence of things and their essential order. In the Fourteenth Century, Duns Scotus "began inside moral philosophy a train of thought which in later centuries would recur in secularized form in the domain of legal philosophy." For he emphasized the point that a thing is good not because it corresponds to the nature of God or analogically to the nature of man, but because God so wills—that the will is a nobler faculty than the intellect. There exists no unchangeable moral order grounded in the nature of things, in the ordered universe of being and of value. Through Occam this led to Machiavelli's *Prince* and to the *Leviathan* of Hobbes. Then came skeptics and agnostics like Hume and utilitarians like Bentham. Common to both was the pronounced distrust of the power and abilities of human reason in individual men. This was partly a natural reaction against the over-estimation of the reason in the era of rationalism. Hume insisted that reason is and ought to be the servant of the passions. Then came the Romantic Movement, in legal philosophy the historical school of jurisprudence insisting that law is merely the creation of the *Volksgeist* or spirit of the people which works in an irrational manner. But the triumph of positivism was a triumph over individualist and rationalist natural law. True natural law, that of the *philosophia perennis*, could not be vanquished even from the realm of jurisprudence.

As Rommen says: "This 'destruction' of the idea of natural law at the hands of Hume was, in the Anglo-Saxon world, of less importance for the survival of the natural-law concept in jurisprudence than one might have expected. This fact must be attributed to the tenacity with which the spirit of the English common law retained the conceptions of natural law and equity which it had assimilated," during the Middle Ages and because of the long period during which natural law remained the critical norm for common law judges. Besides this, there was the influence of Coke.

Positivism had its victory largely because of the spread of philosophical and historical materialism. There was also "a tired agnosticism that admits no metaphysical foundation of law."

Speaking from experience as well as scholarship, Rommen says:

> The nationalist form of totalitarianism arose and flourished most in the two countries where juridical and moral positivism had obtained dominant position in the universities, in the legal profession, and in the official philosophies of law which conditioned or determined the outlook and practice of Courts and governments—Totalitarian propaganda, aware of the recent revival of natural-law thinking, has abused the term "natural-law." Such abuse of revered terms is indeed typical of totalitarianism: witness today the sorry abuse of the term "democracy" at the hands of totalitarian leftist regimes.

Those who are enjoying Judge Wilkin's *Eternal Lawyer,* so well reviewed by Frederic Coudert in the June JOURNAL (page 592) and the writings of Harold R. McKinnon in several issues will relish this book. Those interested in preserving the independence of the judiciary, the freedom of the individual against totalitarianism whether of the Leader, the followers of a party line or an intolerant majority, those who see the only hope for world peace in law based on reason rather than on force or will, will find in Dr. Rommen's book an invaluable support for their convictions. This great refugee scholar seizes the positivist, pragmatist, relativist world by the wrist. He knows, like an indisputably rational, philosophical Hamlet, that the world, having had pointed out to it the difference between the Satyrs of relativism and pseudo natural law and the Hyperion of true natural law, will know where its salvation lies. For men striving to bring order in a chaotic revolutionary world will not batten on an arid and destructive moor when they have leave to feed on the fair mountain of scholastic natural law.

BEN W. PALMER

Minneapolis, Minnesota

AMERICAN MILITARY GOVERNMENT IN GERMANY. *By Harold Zink. July 1, 1947. New York: The Macmillan Company. $4.00. Pages 272.*

This contribution to the inadequate literature on the subject is the first complete account of American Military government operations in Germany. Professor Zink, formerly a consultant on the reorganization of the German government for the U. S. Group, Control Council for Germany (predecessor to OMGUS—

Office of Military Government for Germany) and American editor of the *Handbook for Military Government in Germany,* covers in a readable manner the gamut of our activities.

After devoting fifty-six pages to a critical description of preliminary preparations, recruitment and training of personnel, and staffing and planning, he gives an interesting account of Military Government operations, beginning with the combat phase in 1944 and ending with present-day problems. Major objectives of the United States, including denazification, democratization, re-education, and our economic program, are discussed in a fast-moving manner. Tables and charts are included, but they are already so out of date that they only indicate trends.

The author unfolds his story so faithfully and accurately that your reviewer, whose MG experience was similar to Dr. Zink's, had the feeling that this is the book which the reviewer hoped to write but never did. Upon appearing at the office of the Macmillan Company in the latter part of June with an outline of his manuscript, he was handed an advance copy of this book and told that he had "missed the boat."

Dr. Zink has employed throughout a humorous and ironic style of high-lighting major mistakes which have been made, particularly with respect to the manner in which MG personnel was handled. There is a vivid description of how MG officers, many of whom were attorneys in their late forties who had left substantial practices to accept commissions directly from civilian life, were required to take long marches with full packs on their backs, perform close-order drill, and take part in formal parades as part of their training and preparation for their work in Germany. The author, Hall Professor of Political Science at DePauw University, is particularly bitter at what he considers the War Department's lack of judgment in permitting what was probably the most highly specialized and professionally successful group of former judges, lawyers, college professors, public health experts, former governors, university presidents, engineers, editors, publishers, and businessmen in America, to be trained in England under the command of Army officers who neither measured up to them intellectually nor had the required faith and interest in the necessity for proper preparation. He does concede that during the combat phase, it was necessary that Army officers be in command of all operations and that MG had to be subordinated to tactical requirements.

Charges of bungling and incompetence on the part of MG officials are correctly described as due largely to "lack of background and experience on the part of many American military government officials, both civilian and military, especially in the details of German political and social institutions." Also to blame was "the inability of the United States to furnish clearcut policies in certain fields and to provide unified administrative machinery for handling occupation problems in Washington."

Professor Zink concludes that the American people must be awakened to the tremendous importance of our task in Germany because "the success or failure of Allied military government in Germany will . . . determine whether the world can look forward to peace and reasonably stable economic conditions or whether it will have to face again the horribly forbidding prospect of war on a world-wide scale and economic chaos." He suggests that we commit ourselves to a program in Germany covering at least ten years and that the occupation be taken over by a civil administration which will have adequate funds to recruit a well-trained staff on a permanent civil service basis. Both of these suggestions are worthy of serious consideration.

ELI E. NOBLEMAN
Washington, D. C.

INVENTIONS, PATENTS AND MONOPOLY. *By Peter Meinhardt. With a Foreword by James Mould. London: Stevens and Company, Ltd. 1947. 25 s. (net). Pages xvi, 352.*

Those who wish to gain a broader view of the practical workings of the patent laws and the proposals for changes in them will find this book worth reading. Although it deals primarily with the British law, it makes extensive use of American precedents and rulings. Because of its comprehensive character, it does not try to be encyclopedic in its refinement to details; but much material of a pragmatic character for any day's work is given. The recommendations of the second interim report of the Swan Committee for "reforms" in the British Patent Law are incisively discussed.

PREVIEWS

THE SELECTED WRITINGS of Benjamin Nathan Cardozo: These will be published in the Fall by the Fallon Book Company, with a foreword by Edwin Patterson, Professor of Law at Columbia University. The editor is Miss Margaret Hall, Reference Law Librarian at Columbia. Besides complete texts of Judge Cardozo's four Books, *Growth of the Law, Nature of the Judicial Process, Law and Literature* and *Paradoxes of the Legal Science,* the new work will contain nine chapters consisting of articles from various periodicals, as well as material not previously published.

RUSSIA'S "POLICE STATE" satellites: A first hand report on the European countries which the Soviet Union has drawn into its orbit of the Communist-controlled East has been completed by Hal Lehrman. D. Appleton-Century expects to publish it as *Russia's Europe* early in 1948.

CLEVELAND MURDERS AND *Charleston Murders,* two new books in the Regional Murder Series, edited by Marie Rodell, are scheduled for publication in October and November, respectively, by Duell, Sloan & Pearce. The publishers hope to have *Boston Murders* and *Detroit Murders* ready for Spring.

Lawyers *in the News*

Robert P. PATTERSON

■ In recording here the retirement of Robert P. PATTERSON as Secretary of War after truly distinguished service, we record also an expression of the grateful appreciation of the lawyers of America for the fidelity and skill with which this lawyer has fulfilled his duties to the public and the lasting credit and honor which he has thereby bestowed on the profession of law.

Succeeding to a great tradition of American lawyers as great Secretaries of War—a roster which includes such men as Elihu Root, William Howard Taft, Lindley M. Garrison, and Newton D. Baker—and immediately succeeding Henry L. Stimson with whom he had worked so closely and effectively, Judge PATTERSON has written his name imperishably in that galaxy of faithful public servants in a great office.

Gallant soldier and officer in World War I, public-spirited lawyer in private practice, conscientious and impartial jurist in the District and Circuit Courts, but laying those honors aside from his sense of duty, he was in Plattsburg Camp to condition himself for service in the field when he was summoned to Washington to become the Under Secretary of War.

His open-minded and efficient administration of that office and of the higher post of Secretary of War has added to the luster of the office and to his stature in the eyes of his countrymen. He could have been appointed to the Supreme Court, in which he would have been again a great judge; but he felt that he should stick to his job.

Our Association and the JOURNAL have not hesitated to disagree openly with him on some matters on which we believed him to be wrong or to be taking the advice of men in high "command" who did not see the whole picture. But we testify that as Robert P. PATTERSON leaves office and takes up again the private practice of law, he takes with him the admiration of American lawyers and the gratitude of the people whom he served so well.

Kenneth C. ROYALL

■ Succeeding Judge Patterson as Secretary of War and then taking office as Secretary of the Army under the Secretary of Defense in the unification of the services, is an indefatigable North Carolina lawyer whom our Association and its members count as very much one of our own, because he has been a member since 1926, has come often to our meetings, and has served on our committees and joined heartily in carrying forward many of our projects. Details of his career were in our August, 1946 issue, (page 513).

Successful in private practice, effective as Attorney General of his State, energetic and resourceful as Under Secretary of War, his promotion was a "natural" when Secretary Patterson resigned. Lawyers who know him and esteem him highly have no doubt that, despite the reorganization he will measure up to the requirements and traditions of the great office which lawyers have filled so often and so well.

Joseph Brannon DOOLEY

■ The action of the Senate on July 8 in over-riding a plea of "personal obnoxiousness" by Senator O'Daniel, in order to confirm a nomination reported favorably by the Committee on the Judiciary and supported by our Association, spurs interest in the personality and qualifications of the leader of the organized Bar of Texas who thereby was made a United States District Judge for the Northern District of Texas.

Judge DOOLEY was born in San Angelo, Texas, in 1889, and obtained his law degree at the University of Texas in 1911. He began the practice of law in Amarillo in that year and has lived there ever since, engaged in active and successful work at the Bar. He is a member of the Bar of the Supreme Court of the United States, all Texas Bars, and those of the U. S. Circuit Courts of

Appeals for the Fifth and Tenth Circuits.

In 1940 he was appointed by the Supreme Court of Texas as a member of the committee named to assist the Court in formulating Rules of Civil Procedure for the trial and appellate Courts of that great State. He became a member of our Association in 1928. His leadership in the organized Bar led to his election as President of the Texas State Bar for 1944-45. His nomination for the federal branch on January 8 led to six months of gruelling contest for confirmation. Staunch support given the nominee by Senator Tom Connally, of Texas, member of our Association since 1942, was a substantial factor in the confirmation.

It may well be, as President Carl B. Rix said in July at a meeting of the Local Bar Section of the Texas State Bar, that this controversy in the Senate may prove to be "a blessing in disguise", in that it may lead to a reconsideration and limitation of the rule or practice that a Senator is entitled to have his colleagues refuse to confirm a nominee from his State if the Senator merely states that the nominee is "personally obnoxious" to him, which usually means that some political affiliations or activities of the nominee as a private citizen have been distasteful to the Senator. The implications and operation of the rule were discussed by the Senate Committee on the Judiciary in our August issue (page 805). Certainly it is the right and duty of any Senator to place before the Committee on the Judiciary, and the Senate itself, any facts which he thinks are unfavorable to the nominee's qualifications and fitness for political office. Resort to the "personally obnoxious" rule is probably a natural concomitant or result of a practice of appointing United States District and Circuit Judges solely from one political party and one faction or philosophy within that political party. But all this had nothing to do with the confirmation of Judge DOOLEY, whose experience and high qualifications were attested by the lawyers of his State and were confirmed and supported by our Association's Committee after careful inquiry.

Whatever force may be saved for the "personally obnoxious" rule as to nominations for political offices, it should have no bearing on nominations for the bench. With such a limitation of it should go also a discarding of the concept or practice that nominations for District and Circuit judgeships should be made as rewards for political or factional service and be confined to members of one political party—at present the minority party. Selection for experience, judicial temperament, independence, courage, learning in the law, and innate sense of fairness and justice, regardless of partisanship and politics, is the ideal to which our Association is committed and for which it is hard at work. The Senate's rejection of the "personally obnoxious" challenge as to Judge DOOLEY is clearly a victory along the road toward that ideal.

Evan HOWELL

■ The disposition to select members of the judicial branch of the federal government from among those who are serving or have had experience in the legislative branch, rather than from the Bar or the bench, was further illustrated in July when President Truman nominated and the Senate confirmed Representative Evan HOWELL, of Springfield, Illinois, who at the age of 41 was serving his fourth term in the Congress, to be a Judge of the United States Court of Claims.

HOWELL was graduated from the law school of the University of Illinois in 1930 and began the practice of law in Springfield, where he earned a favorable position at the Bar. From 1937 to 1941 he was Referee in Bankruptcy in the Southern District of Illinois, which position he relinquished to go to Congress. He became a member of our Association in 1943. In politics he is a Republican.

He fills the vacancy caused by the promotion of Judge Marvin Jones, former Congressman from Texas, to be Chief Judge of the Court of Claims. Members of the Court are appointed for life and receive an annual salary of $17,500.

Allen L. OLIVER

■ A present member of the House of Delegates, member of our Association since 1920, President of the Missouri Bar Association in 1944 when it received our Association's Award of Merit for outstanding and constructive services to the profession and the public, has completed his term of office as President-General of the National Society of the Sons of the American Revolution.

Born in Jackson, Missouri, in 1886, OLIVER attended Southeast Missouri Teachers College and the University of Missouri, and was admitted to the Missouri Bar in 1909. He has practiced law in Cape Giraudeau, Missouri, and is a member of a law firm founded by his uncle, the late R. B. Oliver. Present members include R. B. Oliver, Jr., Allen L. Oliver, R. B. Oliver III, and J. L. Oliver.

With about 20,000 members, each a descendant of one who did some overt act in furtherance of the War for American Independence, the Sons of the American Revolution is

one of the largest national organizations of men whose sole purpose is education along patriotic lines. Organized in 1889 and later chartered by Congress, it owns its own headquarters in Washington, D. C., and paid off the last of the debt on its building a year ago. In thus owning and operating its own debt-free edifice, the SAR sets an example for our own Association, which is twice as large. Of Mr. Oliver's Executive Committee of eight (virtually his "cabinet") six were lawyers from as many States. They are A. Herbert Foreman, of Norfolk, Virginia; Wallace C. Hall, of Detroit, Michigan; Judge Smith L. Multer, of East Orange, New Jersey; Judge Benjamin H. Powell, of Austin, Texas; G. Ridgley Sappington of Baltimore, Maryland; and Loren E. Souers, of Canton, Ohio.

Isn't it a bit extraordinary the way in which lawyers come to the leadership in patriotic organizations? President Oliver's successor in office is A. Herbert Foreman. His predecessors were Judge Smith L. Multer, Sterling F. Mutz, of Lincoln, Nebraska, G. Ridgley Sappington, Loren E. Souers, and Messmore Kendall, of New York, all of them lawyers.

Respect for and adherence to the Constitution and our form of government are the foundation of the program of the Society which this member of our House of Delegates headed. Without such a knowledge of the past there can be no vision in the future. The Society therefore stresses the Nationwide observance of such occasions as Constitution Day, Flag Day, Bill of Rights Day, and Washington's Birthday. It continues its efforts to find and mark the graves of Revolutionary soldiers. It has memoralized executive and legislative officers of the Nation to appoint and confirm only men of the highest caliber and character to positions of authority and particularly to the federal judiciary. It has warned of the inroads of Communism in our country, and is at present engaged in a fight in California to keep what it believes to be subversive and Communistic textbooks out of the public schools of the State and has gone over the heads of school boards to Governor Earl Warren and the State Legislature.

Letters to the Editors

From One of the Foremost Statesmen of the Law

To the Editors:

The April copy of your JOURNAL has just come to hand. Permit me to thank you for the very flattering article about me in that issue.

May I congraulate you upon the clear-sighted statement made therein wherein you state that

"If American lawyers and other citizens are to understand what is taking place in the world and to make their contribution to the development of international law and organization as the best hope for peace, our readers need acquaint themselves with the careers and personalities of the lawyer-leaders of other lands, whose courses and actions are bound to affect so much of our law and lives."

I feel that this applies to lawyers of all lands, particularly to those of us who live in the Western Hemisphere as members of the American Family of Nations. The law is the basis of Western and Christian civilization, and it is certainly incumbent upon the lawmakers and the interpreters of the law to maintain that civilization against the disintegrating influences of any isms inimical to our culture and tradition.

OSWALDO ARANHA
Rio de Janeiro, Brazil

Applauds Opening Columns to Both Sides on a Great Issue

To the Editors:

I would like to congratulate your management for providing space in your issues of June and July for publication of articles on the subject of World Federal Government. It is of special significance that leading statesmen, scholars and lawyers have contributed to this vital JOURNAL discussion of the pros and cons of World Federal Government. These articles have undoubtedly stimulated intelligent thinking on this vital subject, and I am confident that by providing space in your JOURNAL for these discussions, the JOURNAL is making a great contribution towards the establishment of permanent world peace.

The United States Junior Chamber of Commerce has adopted resolutions urging the revision and strengthening of the United Nations *Organization* into a United Nations *Government*—a real World Federal Government. The North Carolina Junior Chamber of Commerce has likewise adopted a resolution with the same objectives but in this connection, that organization has undertaken a State-wide educational program on World Federal Government.

I hope that you will continue to make your columns available to intelligent enlightenment on the pros and cons of World Federal Government.

HARRY GANDERSON
Greensboro, North Carolina

Burning Issue That Should Be Debated Without Stint

To the Editors:

This is just a note to congratulate you on the most enlightening and timely discussion of World Govern-

(Continued on page 969)

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Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman

ADMINISTRATIVE LAW

Federal Statutes—Natural Gas Act of 1938—Federal Power Commission—Jurisdiction of United States District Courts to Review Commission's Order Reducing Natural Gas Rates

Interstate Natural Gas Co. v. *Federal Power Commission,* 91 L. ed. Adv. Ops. 1355; 67 Sup. Ct. Rep. 1482; U. S. Law Week 4666 (No. 733, decided June 16, 1947).

The Federal Power Commission in proceedings instituted pursuant to provisions of the Natural Gas Act of 1938 ordered the Natural Gas Company to reduce its rates and file new schedules of rates as reduced. The Circuit Court of Appeals, Fifth Circuit, declined to review the Commissioner's order, one judge dissenting. The Supreme Court granted the Company's petition for certiorari and affirmed.

Mr. Chief Justice VINSON delivered the opinion of the Court. It is first pointed out that this case involves the jurisdiction of the Federal Power Commission to regulate sales made in the field by the gas company to three pipe-line companies each of which transports to markets other than Louisiana gas so purchased.

The Company owns gas wells and a system of field pipe-lines and interests in other pipe-lines through which it transports gas from the Monroe field southward into Mississippi and northward into Louisiana. It also purchases gas from other producers whence it is conducted through its own pipe-lines under pressure to consumers in other states and all of its gas is ultimately intended to be distributed in states other than Louisiana. The Commission found that the Company was an affiliate of one of three gas companies which purchased gas in the Monroe field. The Commission found that the rates charged by the company were "unjust, unreasonable, and unlawful" and ordered substantial rate reductions. The power of Congress to legislate in regard to sale and transportation of natural gas was never denied by the Company but it was contended that in the Natural Gas Act of 1938 it was so limited that it was insufficient to support the Commission's order here under attack.

The opinion then proceeds to an analysis of that Act. Section 1 (b) describes the powers granted to the Commission, those withheld and the limitations on their exercise. The Company's contention was that the sales were not "in interstate commerce" and were a part of the "production or gathering" of gas and hence within the exception to the powers given to the Commission. Both of those contentions were rejected by the Court on a review of the evidence at the Commission hearing and undisputed facts and circumstances shown by the record and it was declared "the sales in question were quite as much in interstate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale."

As to the second point urged by the Company, founded upon the exception from the operation of the Act of Congress of "the production or gathering of natural gas", the opinion summarizes the relevant facts and circumstances, reviews the nature and character of the natural gas industry, examines the authorities cited and gives consideration to the legislative history of the Act and the conclusion is reached that the words in question have a relation to the separation of the powers granted to the Commission in regard to interstate sale and the powers left with the state to regulate the process of bringing the gas out of the earth and into the channels of interstate commerce. T.

The case was argued by Mr. William A. Dougherty for the Gas Company, and by Mr. Charles E. McGee for Federal Power Commission.

CRIMINAL LAW

Self-Incrimination—The Fifth Amendment Not Imposed Upon the States by the Fourteenth Amendment

Adamson v. *California,* 91 L. ed. Adv. Ops. 1464; 67 Sup. Ct. Rep. 1672; U. S. Law Week 4737 (No. 102, decided June 23, 1947).

One Adamson was convicted of first degree murder by a jury in the Superior Court of California and sentenced to death. On his appeal to the Supreme Court of California the judgment was affirmed. On direct appeal the Supreme Court of the United States affirmed that judgment.

On the trial Adamson did not testify. Under the California law if he had testified the prosecution would have been entitled on cross examination to bring out his former convictions of other crimes in order to impeach his veracity. The prosecution commented upon his failure to testify, under provisions of California law which permit court and prosecution in certain situations so to comment.

Mr. Justice REED delivered the opinion of the Court. The opinion points out that the principal con-

tention on the appeal was that the protection of the Fifth Amendment against self-incrimination is a natural privilege or immunity protected against state violation by the Fourteenth Amendment, or, in the alternative, that the right to freedom from self-incrimination was among the rights enumerated in the Federal Bill of Rights and consequently a personal right protected by the Fourteenth Amendment. An additional contention was raised that due process of law under the Fourteenth Amendment forbids comment upon a defendant's failure to testify. The prisoner also attempted to have the California law declared violative of due process because by it he was forced to elect between testifying and keeping his past conviction from the jury and because the presumption of innocence was destroyed by the shifting of the burden of proof to him in permitting comment on his failure to testify.

Mr. Justice REED rejects the first contention on the ground that the Fifth Amendment was not made nor intended to be made binding on the states but was a control on the Federal government only, and the Fourteenth Amendment does not make the Fifth Amendment applicable to criminal cases in state courts on either of the grounds stated in the principal contention of the prisoner. In support of this conclusion, Mr. Justice REED cites and summarizes the *Slaughter House Cases, Twining* v. *New Jersey,* and *Palko* v. *Connecticut.* In closing this portion of the opinion Mr. Justice REED says, "We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship."

Next is taken up the contention that even if the right to immunity from self-incrimination is not secured in state trials by the Fifth Amendment, it is inherent in the right to a fair trial and therefore assured to the prisoner by the due process clause of the Fourteenth Amendment. But the opinion points out that in *Palko* v. *Connecticut* and in other cases it was definitely held that the due process clause "does not draw all the rights of the Federal Bill of Rights under its protection," and specifically that the due process clause does not protect against self-incrimination in state trials. He points out that the due process clause does protect against "compulsion to testify by fear of hurt, torture or exhaustion."

Thus the opinion leads up to the only question left open to examination on the second contention; namely, the constitutionality of the provision of the California law permitting comment under the restriction of that law on failure to testify. Mr. Justice REED recognizes that in most of the states and even in California an accused is protected against compulsory self-incrimination. And most of the states forbid comment upon the failure of the defendant to testify; California however permits it subject to certain limitations. And it is declared that, "We are of the view . . . that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice."

Mr. Justice FRANKFURTER delivered a concurring opinion. He expressed the belief that the decision of the Court might better be rested wholly on the *Twining* case than on the elaboration of other grounds lacking the forty years of unquestioned acceptance which that case has. In support of that view he points out that this case presents only "a minor variant" from that which was before the Court in *Twining* v. *U. S.* The opinion examines the question of the meaning of the due process clause from an historical point of view set out with great particularity and thoroughly documented.

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice DOUGLAS joined. He states his concept of the basic proposition formulated in the prevailing opinion: that although comment upon testimony of a defendant in a trial in a Federal prosecution would run counter to the Fifth Amendment the same comment in a state prosecution would not "violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended." He challenges that interpretation of the law. He also registers his dissent from the reaffirmance of the *Twining* case.

Mr. Justice BLACK reviews the "constitutional, legislative, and general history" that preceded and followed the *Twining* case, and expresses his regret that a complete examination of that history would go far beyond the necessary limitations on opinion-writing. Referring to *Barron* v. *Baltimore,* decided before the adoption of the Fourteenth Amendment, which declared that the first eight amendments were inapplicable to the states, he asserts that the contemporaneous history of the Fourteenth Amendment shows the purpose of that amendment to be to overturn the constitutional rule that decision had announced and make the Bill of Rights of the Federal Constitution applicable to the states. He registers repeated and emphatic dissent to what he terms the "natural law" theory of the prevailing opinion, and insists that the Bill of Rights itself is a safer guide to the meaning of "due process" than for the Court to "roam at will in the limitless area of their own beliefs as to reasonableness."

Mr. Justice MURPHY, with whom Mr. Justice RUTLEDGE concurred, also delivered a dissenting opinion. That opinion declares complete acceptance of Mr. Justice BLACK's dissent with "one reservation and one addition." He is unwilling that the due process clause of the Fourteenth Amendment be limited to the matters specifically set forth in the Bill of Rights but declares it unnecessary to pursue that idea further in this case because of the specific provision of the Fifth Amendment. His addition to Mr. Justice BLACK's dissenting opinion is that it is his belief that the guarantee of the Fifth Amendment against self-incrimination has been violated in this case. T.

The case was argued by Mr. Morris Lavine for Adamson and by Mr.

Walter L. Bowers for California.

[This case takes eighty pages of prevailing, concurring and dissenting opinions. Mr. Justice BLACK's dissenting opinion is accompanied with an Appendix of thirty-one pages setting forth the legislative history of the Fourteenth Amendment. The case is a notable contribution to conflicting views which have long been held as to the question of constitutional law here involved. E. B. T.]

Essentials of Lawful Imprisonment After Pleas of Guilty

Foster, et al. v. *Illinois,* 91 L. ed. Adv. Ops. 1542; 67 Sup. Ct. Rep. 1716; U. S. Law Week 4726 (No. 540, decided June 23, 1947).

Foster and Payne were sentenced to confinement in the Illinois State Penitentiary after pleading guilty to an indictment charging them with burglary and larceny. The controversy here turns on the "legal significance of the circumstances under which the pleas of guilty were accepted." Those "circumstances" may be summarized from the record and the opinion as follows: It seems from the record that the petitioners were furnished with a copy of the indictment and a list of the state's witnesses; were advised of their "rights of trial", and of the consequences of pleas of guilty; they were arraigned in open court where they pleaded guilty to the charges in the indictment; they were again advised and admonished of the consequences of entering pleas of guilty; persisting in those pleas, the pleas were received and entered as of record. It should be noted that the ages of the accused persons were 34 and 48 years respectively, at the time of trial. It also appears that eleven years after their imprisonment the prisoners applied to the Supreme Court of Illinois for their discharge which the Illinois Court denied. The Supreme Court of the United States took the case on certiorari because of the importance of reviewing convictions "where solid doubt is raised whether the requirements of due process have been observed." The Court affirmed the judgment of the Illinois Supreme Court. The opinion of the Court was delivered by Mr. Justice FRANKFURTER.

The opinion declares that the sole concern of the Court is with the claim that the record must show a compliance with the due process clause of the Fourteenth Amendment so far as the right of an accused to the benefit granted is concerned.

The opinion points out that in the federal courts an indigent defendant who is charged with a crime is entitled to the benefit of counsel "in every case, whatever the circumstances", but that prosecutions in state courts are not subject to that requirement. But due process of law does require state courts to give a defendant "ample opportunity to meet an accusation". Accordingly in some circumstances failure to provide an accused with counsel has been held to be evidence of lack of due process.

On this question however the burden of proof of unfairness or lack of due process is on the accused in the state courts "whether the accused contests the charge against him or pleads guilty."

From the case of *Powell* v. *Alabama,* in which the opinion states that the "essential scope of the doctrine" was first declared, it is said that "for the want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement." Many other cases which followed the rule of the *Powell* case were cited. Turning to the record facts of the present case it was pointed out that here there was no showing of the denial of the right of counsel but only "the bald claim" that merely because the record does not show offer of counsel, lack of due process is to be deduced. Mr. Justice FRANKFURTER declares, "We reject such a claim."

Mr. Justice BLACK with whom Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE joined, dissented. The primary basis of the dissent was that the Court by this opinion "waters down the Bill of Rights guarantee of counsel in criminal cases . . . so as to make it compatible with the Court's standards of decency and a fair trial."

Mr. Justice RUTLEDGE with whom Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY concurred, also delivered a dissenting opinion. Mr. Justice RUTLEDGE opens the dissent with these words, "I think the Sixth Amendment's guaranty of the right to counsel in criminal causes is applicable to such proceedings as this in state courts." He next challenges the holding of the prevailing opinion that a recital in the common-law record that the defendants were advised of their "right of trial" and of the consequences of pleading guilty, constituted full performance of the obligation of the trial court as to all the rights of the accused including the right to counsel. On the contrary Mr. Justice RUTLEDGE declares that "this vague and formal recital" without a word of mention of the right to be represented by counsel seems to him to be a clear manifestation that the trial court "deliberately avoided" the matter in the record. He also points to the Illinois statute which requires the court to assign competent counsel in capital cases but not in other criminal cases unless requested by the accused. And he charges that this statutory provision denying, in effect, the right of counsel is in conflict with the principles of the Federal Constitution. T.

The case was argued by Mr. Charles Kaufman for Foster and by Mr. William C. Wines for Illinois.

Constitutional Right to be Represented by Counsel—Second Offenders

Gayes v. *New York,* 91 L. ed. Adv. Ops. 1549; 67 Sup. Ct. Rep. 1711; U. S. Law Week 4729 (No. 405, decided June 23, 1947).

At the time of his first conviction for burglary in the third degree and petty larceny the prisoner was 16 years of age. Three years later he was again indicted for similar offenses, and sentenced as a second offender. Because his first conviction was the basis for computation of the length of his sentence in the second

case, he made an application to vacate the judgment rendered against him in the first case, after serving part of the second sentence, on the grounds that he was not represented by counsel in that first case. The New York trial court denied that motion without opinion. From that judgment he appealed directly to the Supreme Court of the United States, there being no right of appeal in such cases under the law of New York. The Supreme Court affirmed the judgment of the County Court. Mr. Justice FRANKFURTER announced the judgment of the Court in an opinion in which the CHIEF JUSTICE, Mr. Justice REED, and Mr. Justice JACKSON joined. Mr. Justice BURTON concurred in the result.

The prevailing opinion was based upon No. 540, *Foster* v. *Illinois, supra.*

Mr. Justice RUTLEDGE with whom Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY concurred, delivered a dissenting opinion.

Mr. Justice RUTLEDGE depicts the prisoner as a "16-year-old boy, indigent and alone without family, friends, money or counsel to aid him" in the interpretation of the highly technical indictment and in deciding "whether he shall call for proof of the charges or plead guilty."

Mr. Justice RUTLEDGE takes issue with what is said in the prevailing opinion as to the waiver of constitutional right to challenge the conviction for the first offense. He interprets the New York decisions as laying down a procedure substantially equivalent to that which the prisoner is attempting to follow and which the Court deems waiver. T.

The case was argued by Mr. Herbert Wechsler for Gayes and by Mr. Harry L. Rosenthal for New York State.

CONSTITUTIONAL LAW

Trial by Jury—"Blue Ribbon Jury"

Fay v. *New York*, 91 L. ed. Adv. Ops. 1517; 67 Sup. Ct. Rep. 1613; U. S. Law Week 4700 (Nos. 377 and 452, decided June 23, 1947).

Fay and Bove were tried by a so-called "blue ribbon jury," and convicted of conspiring to extort and of extortion. Both of the accused men were labor union officials. Specifically the charge was that contractors to whom had been awarded contracts for the construction of the Delaware Water Supply system had been compelled to pay the accused large sums of money by threats of injury to persons and property. The payments were not denied but it was denied that the money was extorted and it was claimed that the payments were voluntarily made by the contractors to the labor leaders for the exertion of their influence with labor unions. They were found guilty in the New York Supreme Court and the judgments of conviction were affirmed by the Appellate Division of the Supreme Court and by the New York Court of Appeals. The United States Supreme Court took the case on certiorari and affirmed. The accused challenged the conviction on the sole ground that the Act under which the special or "blue ribbon" jury was impaneled offended against the due process and equal protection clauses of the Fourteenth Amendment. There was challenge to the panel from which the jury was drawn but each individual juror was accepted by the defendant without challenge for cause.

Mr. Justice JACKSON delivered the opinion of the Court. The question here posed was stated as follows: "... whether a warranted conviction by a jury individually accepted as fair and unbiased should be set aside on the ground that the make-up of the panel from which they were drawn unfairly narrows the choice of jurors and denies defendants due process of law or equal protection of the laws". Mr. Justice JACKSON summarizes the special jury act. It is shown that it has been in force since the turn of the century and has been in constant use in important cases, that it has been approved by numerous decisions of the New York Court of Appeals and by the Supreme Court of the United States in 1901. Since the question has been narrowed as above stated and the statute is so well known and understood it will not be necessary here to present the detailed study of its provisions contained in the opinion.

Mr. Justice JACKSON declares that on its face no constitutional infirmity is discovered in the statute. It is pointed out that in the metropolitan area of New York the administration of justice is greatly delayed by the examination before the trial of prospective jurors and it is declared that "We cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court." The Court proceeded however to consider three allegations of fact raised as to the administration of the Act: (1) that many classes of laborers were systematically excluded from the special panel, (2) that women were similarly excluded and (3) that the special panel is so composed as to be more prone to convict than the general panel.

As to the claim that many classes of laborers were systematically excluded from the panel, Mr. Justice JACKSON examined and analyzed tables prepared by attorneys for the accused and points out particulars in which those tables fail to show that there was really any difference in the exclusion of laborers from the special and general panels. He rejects those tables as not offering a valid comparison. He refers to the evidence offered by the men who administer the selection of the panels and states that that evidence fails to show the exclusion alleged but on the contrary tends to show that the work of those men was conscientiously and fairly done.

As to the alleged exclusion of women, the opinion points to the provisions of the state law which give women the privilege to serve as jurors coupled with an exemption for those who desire to be excused. One woman juror served on this jury. On a review of this branch of the record, Mr. Justice JACKSON concludes that there was no effort to prevent women from serving and no convincing evi-

dence of intent to exclude them. Another point raised was that discrimination was shown by the furnishing of prospective jurors with questionnaires asking them to indicate the month in which they would prefer to serve. Many prospective jurors indicated their preference whereupon all of those so indicating were placed upon the general panel and not on the special panel. The explanation tendered by officials in justification of that practice was that the choice of time of service could be better arranged for from the general panel and that because of the special character of the cases tried by the special panel, arrangements of that sort were more difficult. That system was declared to be "less than candid" but it was declared to be "an administrative ineptitude of no constitutional significance."

The opinion next takes up what is termed "a more serious allegation," namely, that statistics show that the special juries were prone to convict. Mr. Justice JACKSON devotes eight pages to the discussion of this point and rejects it, saying, "We hold, therefore, that defendants have not carried the burden of showing that the method of their trial denied them equal protection of the law."

The allegation of exclusion of women from the special jury panel was again taken up under the assignment that such an exclusion constituted a denial of due process of law. After an exhaustive discussion of the evidence on this point Mr. Justice JACKSON says, "We may insist on their inclusion on federal juries where by state law they are eligible but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood."

In like manner the point that the alleged exclusion of certain types of laborers constituted a denial of the Fourteenth Amendment due process, after full discussion, Mr. Justice JACKSON rejects. He concludes, "The uncontradicted evidence is that no person was excluded because of his occupation or economic status."

Mr. Justice JACKSON concludes the Court's opinion with the statement, "As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made."

Mr. Justice DOUGLAS dissented without opinion.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice RUTLEDGE joined. Mr. Justice MURPHY says at the outset that the Fourteenth Amendment prohibits a state from convicting any person by use of a jury "which is not impartially drawn from a cross-section of the community." He says that while Congress has the power to legislate for the enforcement of the Fourteenth Amendment and has done so as to racial discrimination, "its failure to legislate as to economic or other discrimination in jury selection does not permit us to stand idly by." He therefore concludes that the Court may judge the action of New York by constitutional standards "without regard to the absence of relevant federal legislation." Indeed he contends that the very fact that the "blue ribbon" jurors are drawn from the general panel is conclusive proof of discrimination. In support of that assertion he refers to certain statistical evidence. Applying his contentions to the method of securing "blue ribbon" juries, Mr. Justice MURPHY says "It [a jury] is a democratic institution, representative of all qualified classes of people. . . . To the extent that a 'blue ribbon' panel fails to reflect this democratic principle, it is constitutionally defective," and he concludes by saying "Since this 'blue ribbon' panel falls short of the constitutional standard of jury selection, the judgments below should be reversed." T.

Mr. Harold R. Medina argued the case for Fay, Messrs. Moses Polakoff and Samuel Mexansky for Bove, and Mr. Whitman Knapp for New York.

The Policy of "Strict Necessity" in Disposing of Constitutional Issues

Rescue Army v. *Municipal Court of Los Angeles,* 91 L. ed. Adv. Ops. 1221; 67 Sup. Ct. Rep. 1409; U. S. Law Week 4604 (No. 574, decided June 9, 1947).

The City of Los Angeles has a code of ordinances regulating solicitation of funds on the city streets for charitable purposes. One Murdock, on behalf of the Rescue Army, was arrested for the violation of those ordinances. He was tried in the Municipal Court of Los Angeles and convicted there. He appealed to the Superior Court of Los Angeles County where his case was remanded for re-trial. On the second trial he was again convicted and the judgment again reversed and remanded. Before the third trial could commence, he brought this suit for a writ of prohibition against further prosecution, claiming that the solicitation of funds for charitable purposes was a part of his religious belief and that the Los Angeles ordinances violated the First and Fourteenth Amendments. The District Court of Appeals denied the writ and the Supreme Court of California affirmed that decision. Murdock then appealed to the Supreme Court of the United States where the Court refused to exercise its jurisdiction because of uncertainties both of law and of fact exposed by the record.

The opinion of the Court was delivered by Mr. Justice RUTLEDGE. There was a painstaking review of all the questions involved which required thirty-five pages. The decision reached was based upon the principle which says that the Supreme Court will not exercise its appellate jurisdiction in constitutional questions, unless the challenged legislation is clear and its interpretation by the highest court of the state eliminates doubt as to its meaning. One quotation from the opinion will illustrate the grounds of the decision. Mr. Justice RUTLEDGE declares, " . . .

jurisdiction here should be exerted only when the jurisdictional question presented by the proceeding in prohibition tenders the underlying constitutional issues in clean-cut and concrete form unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts."

The appeal was therefore dismissed without prejudice.

Mr. Justice BLACK concurred in the result.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice DOUGLAS concurred. He declares that the constitutional questions seem clear to him, that the opinion of the California Supreme Court is not "so ambiguous that the precise constitutional issues in this case have become too blurred for our powers of discernment." He further says that the time is ripe for the Court "to supply the definitive judicial answer." T.

The case was argued by Mr. Robert H. Wallis for Murdock and Mr. John L. Bland for the Municipal Court of Los Angeles.

Effect Under California Law of a Reversal Without Directions

Gospel Army v. *Los Angeles*, 91 L. ed. Adv. Ops. 1241; 67 Sup. Ct. Rep. 1428; U. S. Law Week 4602 (No. 103, decided June 9, 1947).

This is a companion case to *Rescue Army* v. *Municipal Court of Los Angeles, supra.* The Gospel Army applied for an injunction against the enforcement of certain ordinances of the City of Los Angeles on the grounds that they violated its religious liberty under the Constitutions of California and the United States. The City Court granted the injunction and the case was appealed to the appellate division of California and thence transferred to the Supreme Court of California. That court reversed the judgment without direction. An appeal was taken to the Supreme Court of the United States where the jurisdictional question was postponed until the hearing on the merits. The Court dismissed the appeal for want of jurisdiction. Mr. Justice RUTLEDGE delivered the opinion of the Court.

He pointed out that "In California an unqualified reversal, 'that is to say, without direction to the trial court,' is effective to remand the case 'for a new trial and places the parties in the same position as if the case had never been tried.' " He declares that under Section 237 of the Judicial Code, the Supreme Court cannot take jurisdiction of appeals from state courts unless those state judgments are final judgments. For that reason the appeal was dismissed. T.

The case was argued by Mr. Robert H. Wallis for the Gospel Army and by Mr. John L. Bland for the City of Los Angeles.

FEDERAL LAND LAW

School Lands—*Heydenfeldt* v. *Daney Gold and Silver Mining* Co. Followed

United States v. *Wyoming*, 91 L. ed. Adv. Ops. 1187; 67 Sup. Ct. Rep. 1319; U. S. Law Week 4578 (No. 10 Original, decided June 2, 1947).

The lands in dispute were situated in Section 36, Township 58, Park County, Wyoming. A survey had been made of the lands in 1916, seven months after the lands had been placed in a petroleum reserve by presidential proclamation. The United States filed a complaint in the United States Supreme Court against the State of Wyoming and the Ohio Oil Company to establish title of the United States to certain Wyoming lands claimed by the state, and to recover for oil which the Company has taken from the lands under a lease from the state. The case was referred to a special master who submitted to the Court a report in which he recommended a decree quieting plaintiff's title but denying it recovery for the oil heretofore taken. Both plaintiff and defendants entered exceptions to the adverse parts of the master's report and the case came before the Supreme Court on those exceptions. Mr. Chief Justice VINSON delivered the opinion of the Court.

After a full consideration of the arguments of counsel for the State of Wyoming, the Court agreed with the Master's findings for the quieting of title in the plaintiff. This on the authority and precedent of *Heydenfeldt* v. *Daney Gold and Silver Mining Co.* As to the matter of recovery for the oil previously taken, the case was re-committed to the Master for further findings of fact, particularly as to the good faith of the defendant's trespass. T.

The case was argued by Mr. Marvin J. Sonosky for the United States, and by Messrs. C. R. Ellery and Donald R. Richberg for State of Wyoming.

FEDERAL STATUTES

Tucker Act—Action Against Government for Taking and Damaging Private Property by Causing Land To Be Overflowed—Statute of Limitations

United States v. *Dickinson*, 91 L. ed. Adv. Ops. 1308; 67 Sup. Ct. Rep. 1382; U. S. Law Week 4644 (Nos. 77 and 78, decided June 16, 1947).

These actions were brought under the Tucker Act for the recovery of the value of land taken and land damaged by the Government in consequence of the construction of dams which resulted in the permanent overflow of certain lands, and temporary overflow of other lands. In 1935 Congress authorized the construction of those dams to improve the navigability of the Kanawha and other rivers. The elevation of the river bank contemplated different heights of water levels at different parts of the course of the rivers. That work was not all done at a single time. The resulting overflow reached its final stage September 28, 1938. The land was also damaged by erosion of the banks of the river, at different times.

The land owners recovered judgments for the value of the easement taken by the Government for the permanent flooding of the land for the value of easement of the temporary overflow, for the cost of means taken for temporary protection, and for the costs of reclamation of other

lands. The United States Circuit Court of Appeals affirmed the judgment of the District Court. The Supreme Court took the case on certiorari and affirmed.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The opinion points out that the "principal attack" by the United States against the judgments was that "both actions were outlawed". The state statute of limitations is six years. The Government contended that the statute began to run October 21, 1936, when the dams began to impound. In any event, it claimed the statute began to run "not later than on May 30, 1937 when the dam was fully capable of operation and the water was raised above its former level". The complaints were filed April 1, 1943. Although on the latter theory the statute had not run against the plaintiff Dickinson, it was claimed that he could not recover because he had purchased the land after October 21, 1936.

Commenting on the uncertainties as to when the statute began to run as to various parts of the property at various stages of the work the opinion points out that the Government could have taken proceedings to condemn the land and flowage easements as early as it chose and thus have "fixed the time" when the property was "taken".

It was observed that these claims were authorized by the Tucker Act either as "founded upon the Constitution" or as "arising upon implied contracts with the Government".

Mr. Justice FRANKFURTER says "One of the most theory-ridden of legal concepts is a 'cause of action'. This Court has recognized its 'shifting meanings' and the danger of determining rights based upon definitions of 'a cause of action' unrelated to the function which the concept serves in a particular situation."

Mr. Justice FRANKFURTER next proceeds to the definition of the word "taken". He says "Property is taken in the constitutional sense when inroads upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

The opinion pictures the uncertainties which confront the property owners as to the time the statute begins to run against an action to recover damages under such partial, continuing, and changing circumstances, and justifies the postponement of his action until the situation becomes stabilized.

The final decision is summarized as follows: "All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'."

Portsmouth v. *U. S.* by which the Government was "greatly comforted" is examined, distinguished, and held inapplicable to the claim here involved.

Other important questions are discussed including those involved in the controversy whether damages by erosion and otherwise are to be classified as "consequential damages" and therefore not recoverable as an essential feature of the taking, and it is said: "When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account." It was also held that the land owner might recover the expense incurred in "prudent measures" taken to prevent damage, as well as expenses taken by the land owner with the Government's consent to reclaim land overflowed permanently or temporarily. T.

The case was argued by Mr. Ralph S. Boyd for the United States and by Mr. Ernest K. James for the land owners.

LABOR LAW

Federal Statutes—Fair Labor Standards Act—Employees and Independent Contractors

Rutherford Food Corp. v. *McComb*, 91 L. ed. Adv. Ops. 1350; 67 Sup. Ct. Rep. 1473; U. S. Law Week 4652 (No. 562, decided June 16, 1947).

This case involves the question whether a certain class of workers in packing houses and similar places were employees or independent contractors. The Fair Labor Standards Act was considered as in *pari materia* with the National Labor Relations Act and the Social Security Act.

The action was one to require employers to comply with the provisions of the first named Act as to men employed as "boners" in the production of boned meat for the Army and other consumers.

The District Court held that the boners were not employees. The Circuit Court of Appeals held that they were employees and entitled to the benefit of the Fair Labor Standards Act.

Mr. Justice REED delivered the opinion of the Court.

The Supreme Court took the case on certiorari and affirmed the Circuit Court on the main issue but modified it to the effect that the case should be remanded to the District Court for further disposition in conformity with the opinion of the Supreme Court. T.

The case was argued by Mr. E. R. Morrison for Rutherford, and by Miss Bessie Margolin for McComb.

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE Elizabeth B. A. Rogers . . ASSISTANT

Administrative Law . . Administrative Procedure Act . . provision for due regard for convenience and necessity of parties does not confer jurisdiction upon Circuit Court of Appeals to review SEC preliminary order refusing to change place of hearing.

■ *Eastern Utilities Associates* v. *SEC*, C.C.A. 1st, June 13, 1947, Per Curiam. (Digested in 16 U. S. Law Week 2006, July 1, 1947.)

In an administrative proceeding initiated by the SEC under the Public Utility Holding Company Act, Philadelphia was designated as the place of hearing. The present petitioners moved to substitute Boston, but the motion was denied. A review of that order was sought under §24(a) of the Holding Company Act which provides that a person aggrieved may obtain review of an order in the appropriate circuit court of appeals. Although it had been well established that orders of a preliminary or procedural character were not directly reviewable under §24(a), petitioners contended that a different result was required by §5(a) of the Administrative Procedure Act which provides that, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, "due regard shall be had for the convenience and necessity of the parties . . .". They argued that, as a practical matter, immediate review must be given orders such as the present if this right was to be safeguarded. The Court found the argument unpersuasive "especially in view of the provision of §10(c) of the Administrative Procedure Act" which provides that "Any preliminary . . . agency action . . . not directly reviewable shall be subject to review upon the review of the final . . . action . . .". The petition was dismissed for lack of jurisdiction.

Bankruptcy . . General Orders and Forms amended.

■ (Digested in 16 U. S. Law Week 2005, July 1, 1947.)

On June 23, 1947, the U. S. Supreme Court ordered the amendment of General Orders in Bankruptcy No. 1, 10, 13, 24, 26, 27, 35(4), 46, 50(12) and 56 and Forms in Bankruptcy No. 1, 12, 15, 17, 46, 47, 59, 70, 71, and 72. The amendments became effective July 1, 1947. General Order 26 which deals with the accounts of referees was substantially changed. General Order 35 as amended permits payment by installments of filing fees in a voluntary proceeding. It provides that the court may dismiss the proceeding upon the failure of a bankrupt or debtor to pay an installment and that no proceedings upon the discharge shall be instituted until the fees are paid in full. General Orders 26, 50, and 56 substitute the Director of the Administrative Office of the U. S. Courts for the Attorney General for the purpose of certain functions.

Criminal Law . . F.R.Cr.P. . . authorization of waiver of indictment does not violate Fifth Amendment.

■ *Barkman* v. *Sanford*, C.C.A. 5th, June 24, 1947, Waller, C. J. (Digested in 16 U. S. Law Week 2019, July 8, 1947.)

Rule 7, F.R.Cr.P., permits prosecution of a defendant, in a non-capital felony, upon information, if he waives indictment by a grand jury. The question before the Court was whether Rule 7 violates the Fifth Amendment which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." It was argued that the Amendment was a limitation upon the courts rather than a privilege to defendants. The Court disagreed and affirmed a conviction below. It held that the right to an indictment was intended as a protection to the individual to the same extent as were the other provisions of the Fifth Amendment and those of the Sixth Amendment all of which, it was clearly established, could be waived. The Court stated that the submission of the rule to Congress without hostile action by Congress gives it the benefit of the presumption in favor of the constitutionality of legislative acts and that "The fact that the rule was approved and proposed by the Supreme Court also supplies it with an armor of great, but not complete, invincibility."

Department of Justice . . Immigration and Naturalization Service . . Commissioner to exercise all powers of Attorney General relating to Service.

■ Code of Federal Regulations, Tit. 8, Ch. I, Pt. 90 (12 Fed. Reg. 4781).

In the *Federal Register* of July 18, 1947, the Attorney General issued amendments to the rules and regulations governing the organization and authority of the Immigration and Naturalization Service. The amendments provide that the Commissioner of Immigration and Naturalization shall have authority to exercise all powers of the Attorney General relating to all laws administered by that Service. His orders shall be final except that appeals shall lie to the Board of Immigration Appeals where the orders arise in exclusion

or preexamination proceedings; deportation proceedings with certain exceptions; proceedings involving administrative fines and penalties; applications for admission under provisions of the 7th or 9th proviso to §3 of the act of February 5, 1917; petitions filed in accordance with §9(c) of the Immigration Act of 1924 for nonquota or preference quota status; and proceedings for revocation of nonquota or preference quota status previously granted. The Commissioner may certify to the Board for final decision cases which are appealable but have not been appealed. The decision of the Board is final except in cases reviewed by the Attorney General. Cases may be referred to the Attorney General at his direction, or where the chairman or a majority of the Board believe that they should be so referred, or on the Commissioner's request to the Board and its agreement.

Because of the numerous amendments made in Title 8, Chapter 1, the chapter was reprinted in its entirety in the *Federal Register* of July 31, 1947 (12 Fed. Reg. 5065). The reprint contains all the amendments made from the effective date of the original codification through July 31, 1947.

Department of Labor . . Wage and Hour Division . . interpretations of coverage of Fair Labor Standards Act.

■ Code of Federal Regulations, Tit. 29, Ch. V, Subch. B, Pt. 776, §§776.0-776.11 (12 Fed. Reg. 4583).

Because he had issued advisory interpretations as to the general coverage of the wage and hours provisions of the Fair Labor Standards Act since its enactment and because his interpretations were now made controlling, under certain circumstances, by the Portal-to-Portal Act of 1947, the Administrator of the Wage and Hours Division of the Department of Labor announced, in the *Federal Register* of July 11, 1947, the rescission and withdrawal of his previous interpretations. At the same time, he set forth the construction of the law which he believed to be correct and which would guide him unless and until he was otherwise directed by court decision or concluded, upon re-examination, that an interpretation was incorrect. The new interpretations deal with the following matters: General scope of statutory provisions; Employee basis of coverage; Place of work; Immateriality of method of compensation on question of coverage; Exemptions; Engagement in commerce; Engagement in production of goods for commerce; Collection and dissemination of information and production of written materials; Performance of both covered and noncovered work; Local producers using out-of-state raw materials; and Production of materials used in production of other goods for commerce.

Discovery and Inspection . . F.R.Civ.P. 33 . . court extends Government's time to respond to defendant's interrogatories in civil case until disposition of criminal case in which same information by way of bills of particulars had been denied.

■ *U. S.* v. *A. B. Dick Co.*, U.S.D.C., N. Ohio, E. D., June 20, 1947, Freed, D. J. (Digested in 16 U. S. Law Week 2021, July 8, 1947.)

The company, a defendant in both a criminal and a civil proceeding under the Sherman Anti-Trust Act, addressed interrogatories to the U. S. in the civil action. Previously, the Court had overruled in certain respects its motions for bills of particulars in the criminal suit. Contending that disclosure of the information would circumvent the decision on the bills of particulars and jeopardize its prosecution of the criminal suit, the U. S. moved for an order dismissing the interrogatories without prejudice to renew, or extending the time for objecting or responding, until disposition of the criminal proceeding. The company argued that the U. S. had chosen to file the civil action with the return of the indictment and hence could not deprive the company of the rules' benefits. The Court stated that there were no adjudicated cases which shed light on the specific question. It said that Rule 33 vested discretion in the court to extend or shorten the time for the service of the answers and that, since no compelling reasons were shown to convince the Court that defendants would be injured by extending the time to file objections or to respond to the interrogatories until the disposition of the criminal suit, the motion would be granted.

Discovery and Inspection . . F.R.Civ.P. . . defendant not required to furnish witnesses' statements where names disclosed and counsel autonomous . . inspection of photographs and diagrams permitted where defendant had been in superior position . . furnishing of copies not required.

■ *Cogdill* v. *TVA*, U.S.D.C., E. Tenn., N. D., June 25, 1947, Taylor, D. J. (Digested in 16 U. S. Law Week 2020, July 8, 1947.) Supplemental memorandum handed down July 10, 1947. (Digested in 16 U. S. Law Week 2044, July 22, 1947.)

In an action to recover for personal injuries, plaintiff asked, by part two of a motion, that defendant be required to produce for copying and inspection all written statements of witnesses, photographs, maps and diagrams relating to the accident which defendant had in its possession. Affidavits were filed to show the necessity for the information. Defendant contended that the material was privileged. Judge Taylor, in a memorandum upon the original hearing, expressed his intention to grant part two of the motion in toto, saying that defendant had made no showing that it was not in absolute control of the material sought. Upon rehearing, however, he denied so much of part two as required disclosure of statements of witnesses. He said that disclosure by defendant in its opposing affidavits of the names of all who had been interviewed was sufficient for that purpose. In denying access to the statements, he said: "The Court is particularly impressed by so much of the supplemental affidavits as tends to show that the status of counsel for defendant is

that of autonomous attorneys and that there is not sufficient showing of necessity to require said attorneys to disclose to plaintiff the contents of their private file." He was of opinion, however, that, because of the circumstances of the accident and events immediately following, defendant was in an advantageous position to take photographs and make diagrams and maps and that, therefore, plaintiff should be allowed to examine them and copy or photograph them. The Court, on the other hand, sustained an objection to an interrogatory which sought to require defendant to attach copies of all photographs and documentary evidence accumulated in investigation, citing in support of the ruling *Hickman* v. *Taylor* (329 U. S. 495, Preliminary Print; reviewed in 33 A.B.A.J. 265; March, 1947) which Judge Taylor said was based "upon the unreasonableness of invading as a matter of right the 'work product' of the attorney for the defendant . . .".

Dismissal and Nonsuit . . Discontinuance . . F.R.Civ.P. . . defendant's motion to dismiss for lack of jurisdiction and insufficiency of service equivalent of answer in preventing voluntary dismissal by plaintiff.

■ *Kilpatrick* v. *Texas & Pacific R. R. Co.*, U.S.D.C., S. N. Y., June 10, 1947, Caffey, D. J.

In an action to recover for personal injuries under the Federal Employers' Liability Act, defendant moved to vacate the service of process on three grounds two of which were that it was a foreign corporation not doing business in N. Y. and that service was not made upon a proper person. Before argument of the motion, plaintiff began a new action and served upon defendant notice that the original action had been dismissed. Defendant thereupon moved to vacate or dismiss the notice of dismissal. Judge Caffey, in an opinion granting the motion, states that "The situation is most unusual" and "not . . . covered by the Federal Rules of Civil Procedure", but one which "must be resolved by . . . sound judicial discretion." He rules that, since under Rule 41 (a) (1) a plaintiff has the absolute right to withdraw his suit without application to the court only if he does so before defendant has answered and since Rule 12(b) authorizes the points on which defendant relies to be taken either by answer or by motion before answer, defendant's motion should be treated as the equivalent of an answer. He therefore held that plaintiff had no right under Rule 41(a) (1) to dismiss the original action while defendant's motion was still pending undetermined.

Federal Tort Claims Act . . Library of Congress is Federal Agency within meaning of Act.

■ Comp. Gen. Decision B-65754, May 22, 1947.

The Act (§403[a]) gives rights based on acts or omissions of "employees of the Government." That term is stated (§402[a]) to include among others "officers and employees of any Federal Agency." That is, in turn, stated (§402[b]) to include "the executive departments and independent establishments of the United States" and Government corporations. Since the Act expressly refers to "the executive departments and independent establishments of the United States" but makes no reference to legislative agencies, and since it had been repeatedly held that the Library of Congress was a legislative agency, the Library concluded that it was not within the application of the Act. The Comptroller General disagreed. He was of the opinion that the term "Federal Agency" included every Federal agency. He reached his conclusion on the following grounds: (1) the Act waives the sovereign immunity of the U. S. for the negligent or tortious acts of its employees and a complementary provision in §131 of the Legislative Reorganization Act of 1946 (60 Stat. 812) discontinues completely the old system of private bills in such cases; (2) the Act is part of the Legislative Reorganization Act of 1946 which deals primarily with the legislative branch of the Government, and executive departments and independent establishments were specifically mentioned to insure their inclusion within the term "Federal Agency"; and (3) the legislative history of the Act shows that the term was intended to include every Federal agency.

Judges . . President has no power to reject resignation of U. S. Circuit judge . . judge not entitled to reemployment benefits of Selective Service Act.

■ *Clark* v. *U. S.*, U. S. Ct. Claims, July 7, 1947, Whitaker, J.

Plaintiff, a U. S. Circuit judge who served as Lieutenant Colonel in the U. S. Army from March 24, 1942, to May 17, 1945, brought this action for judicial salary from August 15, 1945, to the date of judgment. On the day that he took his oath of office as a Lieutenant Colonel, he had addressed a letter to the President in which he submitted his resignation as a judge. In bringing the action, he proceeded on two theories: first, that the resignation never became effective and, in spite of its acceptance by the President and his subsequent appointment of a successor in office, plaintiff still held the office, and second, that the Service Extension Act of 1941 entitled him to be restored to the position. There was evidence from which it might have been inferred that plaintiff had left to the President the question whether he should resign or go on a leave of absence. There was also evidence that the President rejected the resignation when originally submitted to him. The Court held that the President had no power to continue a judge in office and that, therefore, the question whether the President rejected the resignation was material only in determining whether plaintiff withdrew it before acceptance or the appointment of a successor. The Court found as a fact that, before the resignation was accepted by the President, plaintiff had not withdrawn it and that the President had not, before such acceptance, finally decided that plaintiff should not resign pursuant to the question that

may have been left to him. Whitaker, J., holding against plaintiff on the first theory, said: "The resignation not having been withdrawn, it was within the President's constitutional power to nominate, and the Senate to confirm his successor. After this had been done, and the appointment had been made, if not earlier, plaintiff was no longer entitled to the salary of the office." Proceeding on the second theory, plaintiff relied on §8 (b) of the Selective Training and Service Act of September 16, 1940 (54 Stat. 885, 890) as amended by the Act of July 28, 1942 (56 Stat. 723, 724) made applicable to persons entering the armed services at the time in question by the Service Extension Act of 1941 (55 Stat. 626, 627) as amended by the Act of December 8, 1944 (58 Stat. 798, 799). That section provided that a qualified person who left a position in the employ of the U. S. should, after relief from service, be "restored to such position or to a position of like seniority, status, and pay." The Court held that this section was not intended to apply to a U. S. Circuit judge who had resigned his position. It was said that the resignation, its acceptance, the appointment of a successor and the assumption by the resigned judge of another position created a vacancy in the office. A statute which required his restoration to the position would, said the Court, transcend the power of Congress with respect to the appointment of a U. S. Circuit judge since that power was limited to vesting the appointing power "in the President alone, in the Courts of Law or in the Heads of Departments." It was also said that Congress, by excluding U. S. judges from liability for induction in §5(c) (1) of the Selective Service Act, showed an intention that they should also be excluded from the benefits of §8 thereof. The petition was dismissed.

Labor Law . . Portal-to-Portal Act . . defendant has burden of alleging facts bringing case within exceptions created thereby.

■ *Lemme* v. *La Rosa & Sons,* U.S. D.C., E. N. Y., July 2, 1947, Kennedy, D. J. (Digested in 16 U. S. Law Week 2055, July 29, 1947.)

The Portal-to-Portal Act of 1947 sets forth exceptions to an employer's liability under the Fair Labor Standards Act of 1938. It was the employer's contention on a motion to dismiss the complaint, that the employees must negative these exceptions in order to invoke the court's jurisdiction. The Court, however, found nothing in the Portal-to-Portal Act which annulled the usual rule of pleading that a defendant has the burden of alleging that the case falls within an exception and denied the motion.

Mandamus . . Prohibition . . availability to review order for production of papers . . mere assertion of prejudice to public interest insufficient ground for such review of orders to produce record of Naval Board of Investigation.

■ *The Bank Line, Ltd.* v. *U. S.,* C. C. A. 2d, July 16, 1947, A. Hand, C. J.

In a suit in admiralty to recover damages suffered by its steamship in a collision with a U. S. vessel, Bank Line moved for orders directing the U. S. to produce the record of a Naval Board hearing relating to the collision. It contended that, as the collision occurred in a heavy fog, the circumstances would have to be ascertained through observations of the various vessels present and that the record was necessary to secure the evidence and prepare its case. The U. S. argued that, because the investigation was held for naval purposes only and because of a possibility of disciplinary action, the record was privileged and production against public interest. The lower court granted the motion except as to parts of the record dealing only with disciplinary action. The U. S. filed the present petition for a writ of prohibition and/or mandamus prohibiting enforcement and requiring vacation of the orders. It conceded that they were not final and thus not appealable. The Court decided that the mere assertion by the Navy that the record was privileged and that disclosure was against public interest was an insufficient ground for the petition. It was said that the advantages of testing the privilege by prohibition or mandamus were answered by the disinclination of the Supreme Court to allow such writs as a substitute for appeal, by the fact that a contempt order was appealable, and by the fact that orders other than contempt might be made under Admiralty Rule 32C(b). Although it refused to pass on the orders' merits, the Court referred to statutes, decisions, regulations and opinions for the lower court's consideration in connection with any application for enforcement. Clark, C. J., concurring specially, expressed his disagreement with *Bereslavsky* v. *Caffey* (161 F. 2d 499, 33 A.B.A.J. 724, July, 1947) "both in the decision itself and in the dictum expressing nostalgia for the old separation of law and equity." He also wished to avoid any implication that the Navy had shown adequate grounds for refusing discovery.

Motor Vehicles . . carrier which contracted to transport goods intrastate but which used interstate route cannot recover interstate rate.

■ *Wooleyhan Transport Co.* v. *George Rutledge Co.,* C. C. A. 3rd, July 14, 1947, Maris, C. J. (Digested in 16 U. S. Law Week 2046, July 22, 1947.)

A common carrier by motor truck brought suit against a shipper to recover the difference between the rates quoted, charged and collected by it and the rates shown by its tariff on file with the ICC. The goods were shipped from a point in N. J. to a point in N. J. but were transported over an interstate route. Plaintiff contended that the interstate rate only could be charged, but the Court held that, since there was no regulation in N. J. of motor carrier rates, the carrier was free to charge whatever rate was mutually agreed upon and that it was free to use any of the

existing highways in carrying the goods to their destination. The Court concluded that a carrier could not, by unilateral action, convert a contract for intrastate carriage into one for interstate carriage and so impose upon a shipper a higher rate. Railroad cases where the carrier's line was interstate were distinguished.

Municipal Corporations . . public utility district, authorized to purchase, sell and distribute electric power beyond its limits, held unauthorized to engage in extensive extra-territorial operations.

■ *Washington* v. *Wylie,* Wash. Supreme Ct., June 16, 1947, Hill, J.

Section 6(d) of the Public Utility District Law of the State of Washington (Rem. Rev. Stat. §11610[d]) authorizes a district "To purchase, within or without its limits, electric current for sale and distribution within or without its limits, and to . . . purchase . . . facilities for generating electric current, . . . within or without its limits for the purpose of furnishing said . . . district, and the inhabitants thereof and any other person, . . . within or without its limits, with electric current . . .". The Secretary of Public Utility District No. 1 of Skagit County, Washington, (hereinafter referred to as Skagit) appealed from an order of the Superior Court of that county directing him, at suit of the district, to execute its revenue bonds aggregating $135,000,000 and certain contracts with nine other public utility districts pursuant to the above quoted statute. The bonds were to be issued by Skagit to acquire the properties of the Puget Sound Power & Light Co. in eighteen counties of the state, in all but three of which districts had been organized. Skagit was to operate the production properties, only about 13% of the capacity of which was within its territory. Nine districts were to buy certain of the distribution properties from Skagit and five of them would purchase power from it thereafter. The distribution properties in six of the counties (including the three that were not organized, in one of which the City of Seattle was located) were to be retained by Skagit and, in all six, Skagit would be selling at retail. It would also operate the distribution properties within its own borders. The Supreme Court reversed the order and directed the denial of the application. Hill, J., Millard, J., Steiner, J., and Simpson J., joined in an opinion in which they pointed out that Skagit consumed approximately 5% of the power of the system and that it would sell to districts using six times as much power and to an "unorganized" area using ten times as much power, and said that there was nothing in the statute indicating that districts had power to engage in business beyond their limits "on the grandiose scale here contemplated." Schwellenbach, J., filed a concurring opinion stating that Skagit was not using means provided by the statute to accomplish the purchase of a large system by a district larger than a county in area, population and wealth. Mallery, C. J., Jeffers, J., Robinson, J., and Abel, J., dissented.

Railroad Reorganization . . where state court has enjoined State Treasurer from accepting payments under invalid tax compromise statute and it is not clear, under state law, that contract has not arisen between State and debtor by reason of latter's attempted compliance with invalid statute, question should be determined by state court, rather than reorganization court.

■ *In re Central R. R. Co. of N. J.,* C. C. A. 3rd, July 15, 1947, McLaughlin, C. J. (Digested in 16 U. S. Law Week 2043, July 22, 1947).

New Jersey and the railroads operating therein had been at odds about taxation for some time. To settle the controversy, N. J. had enacted two statutes which permitted payment of the taxes by installments, forgave accrued interest, and set up a lower rate of interest on installments to be paid. The N. J. Chancery Court held these statutes invalid and enjoined the State Treasurer from complying with them. Its decision was affirmed by the N. J. Court of Errors and Appeals. The debtor thereupon asked the reorganization court to decide (1) whether the statute had been set aside as to it in view of the fact that it was not a party to the state court proceedings; and (2) whether its attempted compliance with the statutes constituted the making of a contract with the State. A request by the State Attorney General that determination of these questions be stayed until passed upon by a state court was denied and he appealed. The appeal was kept pending during the Supreme Court's determination of *Gardner* v. *N. J.* (329 U. S. . ., 33 A.B.A.J. 270, March, 1947). In that case, the Supreme Court stated, with respect to the questions of state law here involved, that "it is more fitting that [the state or lower federal courts] more versed than we in the intricacies and niceties of New Jersey law first pass on these questions." The Circuit Court stated that if the only question presented was whether the two above inquiries should be answered by the State or the federal Court, the federal district Court could properly resolve it for there would be involved only questions of state law to be decided as prescribed by *Erie R. R.* v. *Tompkins* (304 U. S. 64). It pointed out, however, the other question raised by the existing injunction, saying that the inability of the State Treasurer to act under the statutes would render nugatory any attempt to pay the taxes and thus any attempt to fulfill the contract, since the reorganization Court's decision would not be binding on the N. J. Courts. Therefore, it was said, unless the statutes were *clearly* void as to the debtor and there was *clearly* no contract protection, those questions must be left to the State Court. The Court then found that the statutes had clearly been held void as to the debtor but that there was a question as to whether a contract had arisen. Thus it stated that it was left "with the unsolved problem of whether one specific Court of . . . New Jersey [since only the N. J. Chancery Court could preserve or dissolve the injunction] would hold this arrangement to be contractual . . .". The Court concluded, "Only

by reference to that state forum can the problem be solved . . .". The Court then held that there was no room for the exercise of discretion in the case and that an error of law had been committed. Goodrich, C. J., dissenting, disagreed with the majority on two grounds: (1) he felt that the question was one of the District Judge's discretion, pointing out in support of this that the Supreme Court had recognized the possibility that the choice might be for either forum; (2) he thought that the majority were announcing a dangerous doctrine: that a state court injunction could interfere with functions of a federal court acting under a statute resting on a Constitutional grant of power.

Telegraphs and Telephones . . Communications Act of 1934 . . Act construed to create civil liability . . recording of telephone conversation through extension from main telephone circuit is interception of message.

■ *Reitmeister* v. *Reitmeister*, C. C. A. 2d, June 23, 1947, L. Hand, C. J. (Digested in 16 U. S. Law Week 2023, July 8, 1947).

Defendant, Louis Reitmeister, had a recording machine attached to an extension of the main telephone wire in his office and recorded conversations which plaintiff, Adolph Reitmeister, had with persons in the office. Subsequently, records of two such conversations were played in a Surrogate's Court which was considering a controversy between Adolph and the executrix of his wife's will. Adolph thereupon brought action to recover damages for violation of the Communications Act of 1934 (47 U. S. C. §605). The first count of the complaint charged Louis with intercepting and publishing the conversation and another charged Louis, the executrix, her husband and her attorney (among others who will not be dealt with in this report) with publicly divulging the messages. On the first count, the jury found that Adolph had consented to the publication by Louis. The court dismissed the other count on the ground that the publication in the Surrogate's Court was privileged. Upon appeal, the judgment was affirmed. The Court said: "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class . . .". L. Hand, C. J., and Clark, C. J., agreed that the messages had been "intercepted" for "we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire" and they held that the issue of consent had been correctly submitted to the jury. They also agreed that, while the publication was not privileged, the verdict on the first count barred action as to Louis on the other count, but they disagreed as to its effect on the other defendants in the latter count, Judge Clark voting for affirmance of the dismissal as to them and Judge Hand for reversal. Chase, C. J., was of the opinion that there was no interception in violation of the Act since the method of communication chosen by Adolph included all receivers in the office and this method was not interfered with. He felt that the overhearing by the machine was no more an interception than overhearing by a person at the office would have been. For this reason, he voted to affirm the judgment on both counts.

Further Proceedings in Cases Previously Reported.

The following action has been taken by the District of Columbia Court of Appeals:

Affirmed: *U. S.* v. *McWilliams*—Criminal Law (33 A.B.A.J. 61; January, 1947). The Court (Groner C. J.), in affirming the dismissal of the "Mass Sedition Case" for failure to prosecute, held that the power so to dismiss was within the sound discretion of the court and such a dismissal would be sustained in the absence of a clear abuse of discretion. Edgerton, J., dissenting, was of the opinion that appellees had not established that the delay was "unnecessary" since it was caused by the following factors: appellees' refusal to continue with another judge presiding an earlier trial which had been interrupted by the judge's death; the difficulty of assigning counsel for many of appellees and the pendency in Congress of a bill to compensate their counsel; the crowded state of the court's criminal docket; and the importance of an investigation being made by the Government in Germany. Judge Edgerton also thought that Judge Laws below was largely influenced by the doubt of a successful prosecution expressed by counsel previously in charge for the Government and that that was not the exercise of any discretion committed to the Court.

The following action has been taken by the Second Circuit Court of Appeals:

Affirmed: *Bernstein* v. *Van Heyghen Freres Societe Anonyme*—International Law (33 A.B.A.J. 61; January, 1947). The Court (L. Hand, C. J.), in affirming the dismissal of an action against defendant who had acquired the Steamship *Gandia*, alleged to have been obtained from plaintiff by duress of Nazi agents, held that the N. Y. courts could not undertake to pass upon the validity of the official acts of another state. It disagreed with plaintiff's contention that the U. S. had relieved its courts of this restraint, saying that no positive evidence was found which showed such an intention on the part of the U. S. and pointing out that such a practice would be destructive of the underlying necessities of a treaty of peace. In reference to plaintiff's argument that, since the U. S. recognized a criminal liability for such wrongs through its participation in the Nuremberg Trial, it would be unreasonable to hold that civil liability did not exist, the Court stated that there was no lack of substantive law invalidating the transfer, but that no U. S. court was permitted to apply that law since the claim was reserved for adjudication along with all other such claims as part of the final settlement with Germany.

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Law School Forums:

A Stimulating Adjunct to Law School Studies

■ This article tells how students in the Harvard Law School conceived the idea of a forum on live issues, developed a plan, and successfully operated this means of keeping themselves informed on the questions which agitate the world outside their cloisters. Competent men debate the pros and cons of current issues, and then answer questions.

Starting small, the forum proved to be a "natural". It moved from hall to larger hall until it now fills Sanders Theatre, Harvard's largest place of assembly. The radio station of the Boston *Herald* gives the discussions free time on the air.

The students at any Law School could do the same thing. Some of the Law Schools have discussion programs, with "outside" speakers. At Harvard Law School the forum has become an institution. The purpose of this article is to make available to others the experience gained at Cambridge. A problem, of course, as to such a forum is to obtain and maintain a balance of reasoned and constructive opinion rather than a sounding-board for propaganda of a particular philosophy or point of view. This can be done if the forum is planned that way and its managers stick to their guns.

The material for the present article has been prepared for the *Journal* by Henry P. Lopez, Special Editor of the Forum's material, and Royal F. Radin of the Forum staff.

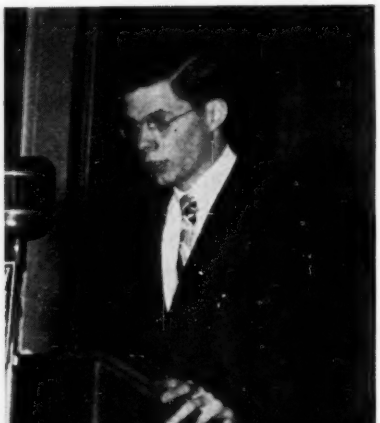
■ Answering the sometimes-justified charge that law students are generally oblivious or unconcerned about "the world outside," students at the Harvard Law School last year organized a forum specifically designed to help its members develop more informed attitudes toward the problems which rage while they study. So successful has the Forum been in its series of discussions of timely national and international affairs that Cantabrigians have come to regard it as a most stimulating source of opinion and information in the Harvard community.

Cognizant of the vital service rendered by the Harvard Law School Forum in presenting such authorities as Justice Owen J. Roberts, John G. Winant, Edward R. Stettinius, Dean Roscoe Pound, Karl Llewellyn, Thurman Arnold, Dean James M. Landis and many others, several Law Schools throughout the country have already organized or plan to organize forums or conferences on a similar pattern. At Harvard the idea was originated by Jerome Rappaport during his freshman year at the Law School. To his personal leadership and innovation during a two-year tenure as the elected president, the Forum owes much of its acclaimed success. But the youthful innovator is quick to point out that the real backbone of the organization has been made up of the thirty or more resourceful students who volunteered from the outset to do the many picayune but necessary tasks that are involved in operating a plan of this kind.

To those acquainted with the day-to-day pressure of work at the Harvard Law School, it may seem surprising that so many students should voluntarily undertake such a time-consuming extra-curricular activity. The reasons are clear. Faced by the exigencies of legal study that leaves little time for outside reading or lectures, the average student found himself growing progressively uninformed about matters beyond the realm of law. This, added to his years of comparative isolation while serving in the war, accentuated the necessity for some means whereby he might catch an occasional meaningful glimpse of domestic and world affairs—particularly in this atomic age when the need for better information and greater understanding has become desperate indeed. The Forum hopes to do its part in serving that need.

Students Not Relieved of Responsibilities of Citizenship

In expressing the philosophic principle underlying the formation of a forum—whether attached to an educational institution or merely a community function—Rappaport said that "unless the embryonic lawyer is prepared to assume that he is relieved of the responsibility of citizenship during a cloistured tenure of study, he cannot afford to ignore the importance of participating in or attending discussions of vital contem-



JEROME RAPPAPORT

porary issues. Those students who are now being prepared for graduation two or three years hence are men of maturity possessed of an unprecedented backlog of experience, men who, by trials of national crisis, have been made acutely aware of the responsibility that rests upon them. In this day no one will seriously question that one can think as a specialist only after he has qualified as a competent citizen in this changing world."

With this principle in mind, student members of the Forum's board of directors – elected by the 3,600 persons who have paid memberships of $3.00 per year – meet periodically for lengthy and serious analysis of topics for discussion and for determining who will be invited to speak in the various forums. Diversity of opinion, seriousness of purpose, and timeliness of issues, have been the guideposts in selecting topics and speakers. Thus it is hoped that the audience will receive the maximum stimulation by being confronted with the *foci* of conflict on debatable, important problems, and that the respective speakers will bring to bear the full impact of their factual information and moral suasion, so that all facets will be bared.

In the manner of the Town Hall Meeting, the Forum also gives its listeners a chance to challenge the experts or to draw out more information on obscure points. The spirited question periods have proved so valuable that Radio Station WHDH of Boston has undertaken a half-hour broadcast of this part of the program, as a public service. It is hoped that for all-important topics there will be nation-wide broadcasts or an extension to full-hour programs next year.

Intellectual Stimulus for Audience and Speakers

Indicative of the high pitch of interest aroused by the give-and-take sessions of the Forum is the frank admission by many of the speakers that they receive a new intellectual challenge. In their compulsion to deal earnestly and candidly with the matter under discussion, they have often cast aside their prepared speeches and have extemporaneously attacked the contentions of their opponents. And, as might be expected, the highly-controversial nature of the forums has attracted over-flow crowds of lay citizens as well as students to the largest hall available in Cambridge – this despite the fact that the discussions are quite often pointedly legal.

If this article has appeared to slight the role of the Harvard Law School Faculty in the operation of the Forum, it is only to emphasize the importance of the students' contribution and not to minimize the professors' considerable aid. Former Dean James M. Landis and Dean Erwin Griswold have been especially helpful in encouraging and advising the founders of the Forum. Other faculty members have proved invaluable in serving as moderators of the discussions, in giving technical advice, and in helping to obtain widely-known authorities in various fields. Needless to say, the guest speakers themselves have been extremely generous and helpful, not only in expounding their views but also in adjusting the content and length of their talks to the needs of a particular forum.

Functional Difficulties in Conducting the Forums

Like many groups of its kind, the Forum has had its functional difficulties. Occasionally, someone in the audience finds himself incapable of allowing some remark to go unanswered. Indeed, in one memorable instance a red-faced member of the audience, feeling it incumbent upon him to aid Senator Ed Johnson (Colorado) in his attack on the British Loan, polemically harrassed Harvard Professor Edward Mason. Finally, the chairman had to "enjoin" the man, Voltaire notwithstanding. Obviously, because of time limitations, the moderator must exercise his discretion in keeping the discussions within comprehensive and rational lines.

With community interest spreading with each succeeding forum, many persons have suggested a change from Sanders Theatre in Cambridge (which has a seating capacity of 1600) to Boston's Symphony Hall, where the American Bar Association held its great Assembly sessions in 1936. Ever-mindful of the original purpose of helping "cloistered" law students to develop broader points of view, the Forum's board of directors has rejected the idea, believing that a more extensive forum would more properly be a community responsibility.

Details of Organizing and Conducting the Forums

Since law students must parsimoniously economize the time spent on outside activities, members of the Forum have necessarily resorted to a "division of labor" among its working staff. To relieve the chairman of the continuous responsibility for every meeting, the Forum board appoints alternating coordinators who assume over-all supervision of the particular meetings assigned to them. Each "coordinator" takes charge of three or four meetings a year, thus enabling him to take full advantage of past experiences. The topic and speakers having been selected months in advance, the coordinator must then correspond or meet with the participants several days in advance, so as to "iron out" the substantive and technical aspects of the particular

forum. Generally, his main problem is to "brief" the faculty moderator on all phases of the meeting, the time requirements, the scope of the subject-matter, the backgrounds of the principal speakers, etc.

With this spade-work out of the way, the coordinator meets with the various committee chairmen for reports on their progress or for special instructions if they are deemed necessary. The preparations committee makes arrangements for the auditorium and allied matters such as hiring of police, the printing of programs, setting up the public address system, and assigning ushers from among the board's membership. Where possible, the chairman will assign one task to each of his aides, so that no one will be unduly burdened. The publicity chairman supervises all matters relating to press, radio and photography, each of his assistants performing separate functions to avoid over-lapping. To the membership committee falls the task of selling tickets to non-members who attend only an occasional forum, as well as signing-up new members. Most of the members of the Harvard Law School Forum join at registration time, and this procedure seems advisable for other schools and organizations.

Another committee which falls under the general supervision of the coordinator is the entertainment committee, which makes train reservations for the speakers, arranges hotel accommodations, and plans pre-forum dinners designed to acquaint the participants and the moderator. With so many details and minor jobs involved, the task of the coordinator is obviously all-important; but the committee chairmen and their staffs must meet their respective responsibilities in a cooperative and punctual manner if the meeting is to be successful. Nevertheless, a smooth-running forum can be organized and operated continuously without over-taxing any one person or group of persons.

Shifting from the specific to the general, it should be pointed out that the long-range plans of a forum must also receive careful attention. At Harvard, the board of directors elects a planning committee which makes periodic surveys of the Forum's progress, suggests needed reorganization and otherwise seeks to orient its activities to meet community and academic needs. One example of this committee's work is the following: When radio station WHDH (Boston) began to broadcast a portion of the Harvard Forum's meetings, it was felt that the broadcasts tended to disrupt the even flow of the program for those present in the audience. Not wishing to relinquish the valuable public service to an apparently-receptive radio audience, the planning committee investigated the problem and was able to devise an arrangement suitable to everyone. The revised programs include two or three formal talks (20 or 30 minutes long, so as to cover a one-hour period); then the program goes on the air, each speaker giving a brief summary of his formal talk, followed by a question period featuring the audience. When the 30-minute broadcast closes, the quiz session continues in the auditorium for as long as the moderator deems advisable.

Perhaps a brief survey of some of the topics discussed would suffice to give the reader a clearer idea of the Forum's accomplishments.

Survey of Some of the Topics Thus Far Discussed

To give the law student deeper insights into the nature of the judicial process, the Forum presented the eminent Dean Roscoe Pound, Karl Llewellyn and Huntington Cairns in a discussion titled "The Philosophy of Law." Robert M. Benjamin of New York and former Dean James M. Landis returned to Cambridge to offer their views on "Administrative Law and Judicial Review." Other specific phases of law were treated in forums bearing the titles, "Trusts and Cartels," "Aeronautical Law," and "The Soviet Legal System"—all of which attracted wide notice and favorable reception from the thousands of persons who heard the commentaries of William H. Davis, Hugh Cox, Erwin Davis and John Hazard.

But the Forum has not been exclusively legal in its orientation. Its broad scope has enveloped the problem of values for modern man as viewed by men like F. S. C. Northrop, Robert Lynd, George Soule and Thomas Eliot, whose respective appearances on the platform of Harvard's historic Sanders' Theatre drew warm responses from students anxiously groping for firmer ground in the chaos threatened by the release of atomic energy.

Serious minded observers welcomed the Forum's series of discussion on American Foreign Policy, particularly as it affects relations with Russia. Late this Spring these problems received further treatment by such leading authorities as Former Ambassador John G. Winant, Abraham H. Feller of the United Nations, Justice Owen J. Roberts and Clark M. Eichelberger. On the domestic level the Forum this year has dealt mainly with the problem of industrial strife, but next year it plans to cover other matters of pressing importance.

Having thus passed its embryonic stage, this student organization shows promise of expanding its services to the Harvard community and greater Boston. Still mindful of the fact that many of their war comrades lost their lives because man has not yet successfully coped with certain basic problems, the numerous veterans on the Forum have dedicated their "civilizing process" to the Harvard Law students and graduates who died in the war. In the words of Professor Zechariah Chaffee, who wrote the dedication:

" . . . The victory they helped win has preserved for us the liberty to share in shaping our own lives and the welfare of our nation and world. Freedom is not safety, but opportunity. The best return which we can make for their sacrifice is to have the determination to make full use of that opportunity by facing the perplexing problems now before us with courage and frankness and open minds."

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

Canada and the United States Exemplify Peaceful Methods of Settling Potential Controversies

■ In striking contrast to what is taking place on other Continents and between other countries comes a recurring instance of amicable adjustment of problems and possible frictions, between Canada and the United States. As shown in a State Department release on July 18, the International Joint Commission of the two countries has been in session at Sault Ste. Marie, Ontario, Canada, and other points, to consider measures to suppress the pollution of boundary waters consisting of the St. Marys River, St. Clair River, Lake St. Clair, and the Detroit River pursuant to references of these matters to the Commission by both Governments dated April 1, 1946, and October 3, 1946. This is pursuant to the precedent-making Treaty between the United States and Great Britain signed January 11, 1909 (Treaty Series, No. 548). Experts for the two countries have made factual and technical investigations as to causes and preventions of the pollutions. An interim report is expected when the Commission meets in Ottawa on October 7. This useful Commission exemplifies a much more satisfactory method of solving border disputes and problems than the procedure being followed in Europe.

World Federal Union or World Government To Be Discussed in Cleveland

One of the liveliest features of the Cleveland meeting of our Association this month will be the discussion of the desirable form of international organization or world government, which will be staged at 3:00 P.M., on September 22, by the Section of International and Comparative Law. Able advocates of the various opposing points of view will take part. Attendance will necessarily be limited to members of the Association and participation to members of the Section. Members who are interested in the subject will do well to come to Cleveland and attend.

Much interest in the subject has been aroused among lawyers by the articles which the JOURNAL has published from time to time, within the limits of its space, to give its readers the benefit of the forceful presentation of reasoned views, for and against the various proposals being agitated. These articles have also commanded attention outside the profession, and the JOURNAL has been commended for publishing them, as a public service on a great issue on which the lawyers should aid an informed public opinion.

The debate in the Section will doubtless measure up to a high standard of discussion. The issue may also come before the House of Delegates and the Assembly, which constitute the bicameral policy-determining agency of the Association and the organized profession.

Inter-American Bar Association to Meet in Lima, Peru, November 25-December 8

Because of the enhanced importance of understanding and co-operation among the peoples and governments of the Americans, lawyers are taking interest in the Fifth Conference of the Inter-American Bar Association, to be held November 25-December 8, in Lima, Peru. Originally scheduled for April, it was postponed to a time when additional hotel facilities in Lima will be available. The Association is composed of member associations from all of the republics of this hemisphere except Nicaragua and El Salvador, and from Canada. About 400 individual lawyers participate in its work through membership on Committees and Sections. Each of the latter includes several topics of interest to jurists and practicing lawyers. In so far as practicable, at least one lawyer from each National member association is on each committee.

The announced list of topics assigned to member Associations in the United States and Canada shows that the Lima conference will deal with many subjects vital to the future of international law.

Report as to Formulating the Principles of the Nuremberg Charter and Judgment

The General Assembly of The United Nations will consider at its sessions which are to be resumed in mid-September the following report and recommendations of its committee on international law, as to plans for the formulation of the principles of the Nuremberg Charter and Judgment:

1. By a Resolution of 11 December 1946 the General Assembly directed this Committee "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an international criminal code, of the principles recognized in the

Charter of the Nuremberg Tribunal and in the judgment of the Tribunal".

2. The Committee considered the nature of the task entrusted to it by this Resolution. In particular it noted that the General Assembly had requested it to propose "plans for the formulation" of the Nuremberg principles, and the Committee by a majority decided not to undertake the actual formulation of those principles, which would clearly be a task demanding careful and prolonged study. The Committee therefore concluded that it was not called upon to discuss the substantive provisions of the Nuremberg principles, and that such a discussion would be better entrusted to the International Law Commission, the establishment of which it had decided to recommend to the General Assembly. It recommends unanimously that the ILC should be invited to prepare

(a) A draft convention incorporating the principles of international law recognized by the Charter of the Nuremberg Tribunal[1] and sanctioned by the judgment of that Tribunal[2], and

(b) A detailed draft plan of general codification of offenses against the peace and security of mankind in such manner that the plan should clearly indicate the place to be accorded to the principles mentioned in sub-paragraph (a) of this paragraph.

The Committee further desires to record its opinion that this task would not preclude the ILC from drafting in due course a code of international penal law.

3. The Committee also decided by a majority to draw the attention of the General Assembly to the fact that the implementation of the principles of the Nuremberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority[3] to exercise jurisdiction over such crimes.

The Representatives for Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics, and Yugoslavia desired to have their dissent from this decision recorded in this Report. In their opinion the question of establishing an international court falls outside the terms of reference from the General Assembly to the Committee.

Recommendation to the General Assembly as to a Declaration of the Rights and Duties of States

The General Assembly's Committee whose recommendations of plan for the progressive development and codification of international law were published in full in our June issue (page 621) made the following report on the draft Declaration, submitted by Panama, on the Rights and Duties of States:

1. By a Resolution of 11 December 1946 the General Assembly instructed the Secretary-General to transmit to all Member States of the United Nations and to national and international bodies concerned with international law the text of a draft Declaration on the Rights and Duties of States presented by Panama, with the request that they should submit their comments and observations to the Secretary-General before 1 June 1947. This Resolution also referred the Declaration to this Committee, and requested the Secretary-General to transmit to it the comments and observations as they were received.

2. The Committee, noting that a very limited number of comments and observations from the Member States of the United Nations (6) and national and international non-governmental bodies (3) had been received on the Draft Declaration on the Rights and Duties of States presented by Panama, and considering that the majority of these comments and observations recommended postponement of the study of the substance of this question, recommends:

(a) That the General Assembly entrust further studies concerning this subject to the ILC in accordance with the procedure finally adopted by the General Assembly for the progressive development of international law and its codification.

(b) That the ILC should take the Draft Declaration on Rights and Duties of States presented by Panama as one of the bases of its study.

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1. The Representative of France submitted a memorandum on 27 May 1947 concerning draft texts relating to the Principles of the Charter and Judgment of the Nuremberg Tribunal. (A/AC. 10/34).

2. The Representative of Poland desired to have it placed on record that the Polish Government considers that propaganda of aggressive wars constitutes a crime under international law and falls under the scope of preparation to such wars as listed in Article 6a of the Statute of Nuremberg. This crime is a dangerous form of preparation, likely to cause and increase international friction and lead to armed conflicts. It is a form of psychological armaments as opposed to the notion of moral disarmament. The Criminal Code of Poland, which is in force from 1 September 1932, contains the prohibition of propaganda of wars of aggression in its Article 113. The Polish Government expects that a similar provision will be incorporated into the codification of Crimes against Peace and Security, and requests that the International Law Commission take appropriate action on this matter as one of primary importance. The Representatives of Yugoslavia and the Soviet Union associate themselves with this statement.

3. The Representative of France submitted a memorandum on 15 May 1947 concerning a draft proposal for the establishment of an international court of criminal jurisdiction.

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Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"An Analysis of the Regulation of Food, Drugs and Cosmetics":* In the first of a series of articles on the regulation of food, drugs and cosmetics, Maurice L. Cowen, in the May-June issue of the *Illinois Law Review* (Vol. XLII, No. 2; pages 169-191), analyzes the major divisions of the Federal Food, Drug and Cosmetic Act of 1938, relating to adulteration and misbranding, and the Wheeler-Lea amendment to the Federal Trade Commission Act, aimed at elimination of false and misleading advertising. Since producers and manufacturers need expert advice to enable them to comply with the statutes and the regulations issued thereunder, and since the public has come to rely on such compliance, the stated purpose of the author is to stimulate both study and caution on the part of the general practitioner in giving needed advice to clients. (Address: Illinois Law Review, Northwestern University Press, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.00).

ADMINISTRATIVE LAW—*"Broadcast License Revocation for Deception and Illegal Transfer":* A note in the June issue of the *George Washington Law Review* (Vol. 15—No. 4; pages 425-443) analyzes decisions of the Federal Communications Commission in cases where a licensee of a radio broadcast station has violated the provisions of the Communications Act by making false statements in his application for a license or by transfering ownership or control of his station without the Commission's consent. The author notes that until the past few years, it was the policy of the FCC not to withhold renewals of licenses even where such violations were clear. It is submitted that its refusal to renew licenses in several recent cases where such violations were established may have been influenced by the fact that under present conditions it is improbable that any community would be long without primary broadcast service if an existing station were removed. (Address: George Washington Law Review, George Washington University, Washington, D. C.; price for a single copy: $1.00.)

CONGRESSIONAL REORGANIZATION ACT—*Lobbying—"Federal Regulation of Lobbyists":* A summary of the provisions of the new statute against lobbying, a brief review of its legislative background, and the common-law view as to the validity of lobbying contracts, are set forth in a note in the June issue of the *George Washington Law Review* (Vol. 15—No. 4; pages 455-463). It will be helpful to those who are primarily interested in broad phases of the subject-matter. (Address: George Washington Law Review, George Washington University, Washington, D. C.; price for a single copy: $1.00.)

CONSTITUTIONAL LAW—*"The Right of State Interposition":* Howard Newcomb Morse, of the Georgia Bar, Professor of Constitutional Law in the Augusta Law School, a member of our Association since 1946 and of its Section of International and Comparative Law, contributed to the March issue of the *Dickinson Law Review* (Vol. LI —No. 3; pages 174-184) a thoughtful article on the developments affecting the constitutional powers and relationships of the three branches of the federal government and their hegemony as to the States. His thesis, novel in some respects, is that the sovereignty resides with the people of each State, that each State Govern-

EDITOR'S NOTE: In a letter to the editor from William F. Zacharias, of Chicago, concerning the *Index to Legal Periodicals,* published by the American Association of Law Libraries, Mr. Zacharias said that while the *Index* may not be in individual lawyers' libraries it will be found in law libraries. Forrest S. Drummond, of the Association of the Bar of the City of New York, Chairman of the Committee on the *Index* in the American Association of Law Libraries, asks us to supply our readers with the information that law firms and individual lawyers may subscribe for the *Index*. Information as to the price can be had from the H. W. Wilson Company, 950 University Avenue, New York City 52. "Attorneys will find that this valuable tool actually costs them very little," says Mr. Drummond.

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

ment is the agent of its people, that the federal government is the delegated joint sub-agent of the States, and that the people of the United States delegated no new or additional powers when they ratified the Constitution but transferred these powers from the States to their sub-agent. (Address: Dickinson Law Review, Carlisle, Pa.; price for a single copy: 75 cents).

FEDERAL PROCEDURE—*Jurisdiction—Pleading and Practice in Civil Cases—"Federal Question—The Jurisdictional Enigma of the Insufficient Complaint":* A note in the May issue of the *Yale Law Journal* (Vol. 56, No. 5; pages 880-885) comments critically on the District Court decision in *Downing* v. *Howard* (68 F. Supp. 6), which dismissed for lack of jurisdiction of the subject matter a complaint in a stockholder's derivative action for alleged violations of the Public Utility Holding Company Act. Although recognizing that the federal Courts may properly refuse jurisdiction where the federal question is immaterial or insubstantial and frivolous, the writer takes the view that a ruling that there is no causal connection between the claimed violation and the loss goes to the legal insufficiency of the plaintiff's claim, and as such requires dismissal on the merits rather than on jurisdictional grounds. (Address: Yale Law Journal, Box 401A, Yale Station, New Haven, Conn.; price for a single copy: $1.00).

INSURANCE LAW—*"What Protection Is Afforded Under Loading and Unloading Clauses of an Automobile Policy:"* The April issue of the *Commercial Law Journal* (Vol. 52 No. 3; pages 58-61) contained a useful article under the above quoted title by Gibson B. Witherspoon, of the Mississippi Bar. The article was reprinted in the July issue of the *Insurance Law Journal.* (Address: Commercial Law Journal, 111 West Monroe, Chicago 3, Ill.; price for a single copy: 25 cents).

LABOR LAW—*"Labor Relations and Labor Law, A Symposium":* Subject to the right of all concerned to agitate politically for its amendment, strengthening or repeal, it is coming to be recognized generally that the Taft-Hartley Act has ushered in a new era in labor-management relations. The field of labor relations has been broadened to embrace substantial rights of the public and of the individual employee. The basic premise of the new law is that the individual employee has a fundamental right to work, free of coercion, for whatever employer is willing and able to employ him, and that obstructions to the free flow of commerce must be eliminated, whether they emanate from the unfair labor practice of either an employer or a labor organization. There is great need that the new law, which has been so vehemently misrepresented as to what it does and does not do, shall be understood by the people.

The average lawyer will gain a better insight and understanding of the background and origins of the Act, the practices intended to be corrected by it, and the basis for labor's objections to many of its provisions, the alternatives which might have been enacted instead of it, etc., by reading the belated April issue of the *University of Chicago Law Review* (Vol. 14, No. 3; pages 331-454). The articles were written before the final legislative struggle over the Taft-Hartley Act, and appear to be mostly an argument against it or its early form.

The first article, "A Capitalist Looks at Labor," is by Cyrus Eaton, Cleveland industrialist and banker who has been in the vanguard of employers who urge "getting along with labor." He saw labor as having now come of age; he admonished industrialists to deal directly with labor organizations and accept them as a partner in industry, in order thereby to avoid or lessen the interventions by Government, preserve the capitalist economy, and achieve maximum production. His exposition might not be accepted by employers generally as expressive of their attitude while the Wagner Act was in force unamended, but it states a forward-looking realistic view.

The considerations which led a bi-partisan majority in the Congress to enact the Taft-Hartley law do not appear to be comprehensively expressed in the compilation of articles.

Senator Wayne Morse, of Oregon, militant leader of legislative resistance to passage of the Taft-Hartley Act, summarized the views which he voiced later during the Senate debate (hardly those with which he took up the time during his one-man filibuster). His program, as developed under "A Realistic Approach to Labor Legislation," would have been based on a two-fold premise: (1) That labor legislation of a punitive, restrictive and prohibitive type would be unenforceable and conducive of labor discontent and unrest; and (2) that there was unmistakable need for reasonable regulation and control of labor organizations to protect the individual worker and the public from union excesses. Dealing with measures designed to achieve such control, he proposed to outlaw jurisdictional strikes and boycotts designed to force an employer to recognize a union; also, to empower the Government to obtain speedy judicial relief when labor disputes involving unfair labor practices threaten seriously to impair vital sections of the National economy.

Lloyd K. Garrison, now of the District of Columbia Bar, formerly Dean of the University of Wisconsin Law School and General Counsel and later Executive Director and Vice-Chairman of the National War Labor Board, offered a "Proposal for a Labor-Management Board and a Charter of Fair Labor Practices." He addressed himself to the knotty problems as to how best to avoid major industrial conflicts in which there are involved no elements of wrongdoing but only the question of what the terms of employment should be. His plan would be to establish a continuing organized relationship between representatives

of industry and labor; he outlines a federal statute to establish such a board and facilitate the negotiation of collective bargaining contracts and the settlement of industrial disputes.

Lee Pressman, General Counsel of the CIO and member of the House of Delegates of our Association, discussed the proposed statutory restrictions and controls of labor organizations under the heading "Freedom and Reaction: Some Observations on the Current Anti-Labor Drive." Along the line of his many published statements for the CIO, he criticized severely the proposals, since enacted in the Taft-Hartley Act, as measures that undermine the basic rights of labor, make for the open shop, and impair rather than improve collective bargaining.

Professors Charles O. Gregory and Richard F. Watt, both of the University of Chicago Law School, discussed and criticized adversely the decision of the Supreme Court in *U. S.* v. *United Mine Workers of America*, 67 S. Ct. 677 (1947). They argued that the ruling in the John L. Lewis case was unsound in principle, destructive of labor's right to strike, and bound to have harmful effects upon industrial relations. Professor Gregory wrote "Government by Injunction Again," and Professor Watt's article was captioned "The Divine Right of Government by Judiciary." Their argument is generally that reflected by the minority in the Court.

Professor Paul H. Douglas, also of the University of Chicago, gave "A Possible Method of Dealing with the Closed Shop Issue." His ideas appear to be those which to a large extent were made the basis for the "union shop" provisions of the Taft-Hartley Act.

Professor Raleigh W. Stone, of the School of Business of the University of Chicago, stated his ideas as to "Trade Unionism in a Free Enterprise Economy." He would break down and limit unions to a company or area basis, in order to reduce union power and limit its monopolistic and restrictive controls to prudent proportions. (Address: University of Chicago Law Review, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: $1.00).

PRACTICE AND PROCEDURE—*State Rules of Civil Procedure—"Determination of Controversies Without a Factual Trial":* In the March issue of the *Iowa Law Review* (Vol. 32, No. 3; pages 417-435) Charles W. Joiner, of the Iowa Bar, Assistant Professor of Law at the University of Michigan, discusses the procedural devices available under the newly-adopted Iowa Rules of Civil Procedure, for the determination of controversies without a factual trial. These devices include: The motion for judgment on the pleadings, the motion for summary judgment, the application for separate adjudication of law points, the motion to dismiss or strike, and the offer to confess judgment. It is the author's conclusion that the use of one or more of the foregoing procedures should be considered by counsel in virtually every case in which he is engaged, to the end that controversies may be disposed of as speedily as possible in the interest of justice. (Address: Iowa Law Review, Iowa City, Iowa; price for a single copy: $1.00).

TAXATION—*Estate Tax—Trusts and Estates—Conflicting Claims of States—"Avoidance of Double Death Taxation of Estates and Trusts":* The competition for the taxpayer's dollar between States and between the State and the federal governments is well illustrated in the field of the estate tax, where each of several States may claim a wealthy decedent as its resident and many States may attempt to tax intangibles belonging to the decedent without regard to residence. Abraham S. Guterman, of the New York Bar, discusses these angles in the June issue of the *University of Pennsylvania Law Review* (Vol. 95, No. 6; pages 701-718). His article is devoted chiefly to domicile and how to change it; useful reminders are given as to consequences often overlooked, such as those resulting from the varying rules in different jurisdictions as to the inclusion for estate tax purposes of *inter vivos* trusts and powers of appointment. (University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia 4, Pa.; price for a single copy: $1.00).

TAXATION—*"Federal Taxes and the Family"; "Application of Federal Income, Estate and Gift Tax Laws to Community Property":* To those interested in the removal of the discrimination in the application of the Federal Income Tax laws which now favor residents of the community property States, two articles should be especially illuminating. The first, entitled "Federal Taxes and the Family" is the leading article in the April number of *Southern California Law Review* (Volume XX—No. 3; pages 243-263). The author is John W. Ervin, Assistant Profesosr of Law at the University of Southern California. His discussion is the outgrowth of his thesis for a Master's degree at the Harvard Law School. It makes a strong case on the law and statistics for amending Section 51(b) of the Internal Revenue Code as the simplest method for extending "the income tax benefits of community property to the entire country without forcing the adoption of that system by the States as a law of marital property".

The second article was in the February issue of the *Michigan Law Review,* (Volume 45—No. 4; pages 409-444). Its author is Willard S. Pedersen, of the Bar of the State of Washington. He reviews the basis of the community property doctrine and the development of the rule by decisions of the Supreme Court, which permits the wage-earner who is resident of a community property State to split his income with his spouse for federal income tax purposes. He also reviews the steps taken by several of the States to establish by statute this tax advantage. (Addresses: Southern California Law Review, 3660 University Avenue, Los Angeles 7, Cal.; price for a single copy: $1.00; Michigan Law Re-

view, University of Michigan, Ann Arbor, Mich.; price for a single copy: $1.00.)

TAXATION—*Federal Income Tax – Deductions – Rental Property "Used in Trade or Business":* We hope that this department does not stray too often from the law magazines which are its field; but when we find elsewhere an article which may help some lawyers, we tell about it. In the June issue of the *Journal of Accountancy* (Vol. 83, No. 6; pages 477-482) Edward T. Roehner, of the New York Bar, questions the validity of the Tax Court's position that for tax purposes rental property should be regarded as used in trade or business. His thesis is that the legislative history of the sections involved indicates clearly that a contrary view is required and that taxpayers should, therefore, be deprived of the benefits of Section 117(j) of the Code, which allows losses on such properties to be deducted in full. The position of the Commissioner of Internal Revenue accords with neither that of the Tax Court nor that of Mr. Roehner; his Regulations require a varying treatment, depending on the extent of the taxpayer's activities. It was, of course, precisely this situation concerning which John Dane, Jr. complained in the November (1945) issue of the *Harvard Law Review* (his note being reviewed in this department in our April, 1946, issue).

If an attack on the Tax Court's position is ever successful, Mr. Roehner's article gives the lines of effective attack. So it is recommended reading for practitioners with an interest in the immediate problem, and for those such as Mr. Dane whose broader concern is with the administrative finality of departmental regulations. (Address: American Institute Publishing Company, 13 East 41st Street, New York 17, N. Y.; price for a single copy: 50 cents).

TAXATION—*Federal Estate Tax – Trusts – "Reversions, Resulting Trusts and the Estate Tax":* The *Rocky Mountain Law Review* for June (Vol. 19, No. 4; pages 305-340) gives a timely article by George Louis Creamer, of the Colorado Bar. He discusses in detail the Supreme Court cases leading up to the current attempts by the Treasury Department to tax to the estate of the settlor all trusts in which any reversionary interest can be found, whether expressly reserved or arising by operation of law; he refers also to many rulings in lower Courts. He criticises as unrealistic many of the decisions imposing a tax. One factor which he does not stress and which the Courts are prone to overlook is that no tax should be imposed upon the settlor's estate unless the remainder interests under the trust are in some way contingent upon the beneficiaries surviving the settlor. *Treasury Department Reg. 105,* Sec. 81.17. (Address: Rocky Mountain Law Review, University of Colorado, Boulder, Colo.; price for a single copy: $1.00).

TAXATION – *Procedure for Recovering Overpaid Federal Taxes—"Tax Refund Suits Against Collectors of Internal Revenue":* William T. Plumb, Jr., of the U. S. Treasury Department, contributed most usefully to the May issue of the *Harvard Law Review* (Vol. LX, No. 5; pages 685-709), an article which discusses the consequences which enter into the selection of the advisable course of action in suing for recovery of overpaid federal taxes—shall the taxpayer sue the United States or shall he sue the Collector of Internal Revenue?

The procedure of suing the Collector is an anachronism inherited from the earlier Courts and their efforts to do justice in a time when taxpayers were unable to sue the United States. Notwithstanding the queer fiction of suing an individual who is in no manner personally responsible, it is often of vital importance that the procedural choice be in its favor—this because of the advantages such a course affords. In addition to considerations of forum and the right to trial by jury, there are other factors of importance, the very existence of which may surprise even the veteran practitioner in tax matters.

Perforce speaking for himself and not for his department, Mr. Plumb suggests methods for eliminating or modifying the fictional procedure to allow suits to be brought against the United States in a manner which would preserve the valuable incidents of the older remedy and would rid it of its pitfalls.

In the same issue a note entitled "The Private Tax Collector—A New Fiduciary" (pages 786-793) gives an interesting discussion of some of the problems of applying trust principles in situations arising where there has been collection or withholding of taxes by vendors and employers in the place of direct collection of such taxes from the government itself. This is a good issue to have, read, keep and refer to when you are about to sue. (Address: Harvard Law Review, Cambridge, Mass.; price for a single copy: $1.00).

TAXATION – *Federal Income Taxes—"Constructive Receipt of Income—The Tax Court, the Treasury and Section 24(c)" of the IRC:* The prolific but painstaking Edward T. Roehner, of the New York Bar, writes in the July number of *Taxes* (Vol. 25, No. 7; pages 637-641) on the above subject. His contention is that either the Tax Court is in error in holding that constructive receipt during the taxable year of the debtor is sufficient to prevent the application of Section 24(c), or it is in error in holding that constructive receipt within the next two and one-half months is insufficient to prevent the application of Section 24(c). His contention is that 24(c) furnishes the identical test of the right to the deduction in both cases. His article is a sprightly but documented reply to Mark H. Johnson, Chairman of our Taxation Section's Committee on Publications, which supplies our "Tax Notes." Mr. Johnson evidently agrees with the Tax Court (Rabkin and Johnson: *Federal Income, Gift and Estate Taxes);* Jacob Mertens has difficulty with the provision (Mertens: *Law of Federal Income Taxation).* Roehner's disagreement with Mark Johnson on statutory con-

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struction is interestingly argued; the author concludes with definitive "advice to counsel" who has a case worth the contest. (Address: Taxes, Commerce Clearing House, Inc., 214 N. Michigan Avenue, Chicago 1, Ill.; price for a single copy: 50 cents).

WILLS AND TRUSTS—*Construction—"Class Gifts, Effect of Failure of Class Member to Survive the Testator":* The preparation and interpretation of wills and trust agreements provide material for endless discussions, usually summarized in the statement that no will has a twin brother. Nevertheless, there are definite rules which must not be overlooked if a testator's wishes are to be carried out and his intention made effective. Useful admonitions as to this vigilance are in an article in the *Harvard Law Review* for May (Vol. 60, No. 5; pages 751-775). Professor A. James Casner, of the Harvard Law School, directs his discussion to the narrow issue above quoted —one which frequently arises. He pragmatically emphasizes that draftsmen of wills or trust agreements should ascertain fully what the testator wishes to accomplish and then express those wishes in clear terms, not relying on statutory provisions or judicial rulings to fill in the gaps. (Address: Harvard Law Review, Gannett House, Cambridge, Mass ; price for a single copy: $1.00).

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Mark H. Johnson, Committee Chairman.

Review of Tax Court Decisions —Administrative Procedure Act and Pending Legislation

■ In the first appellate Court decision on the subject, the Sixth Circuit has stated that the review of Tax Court decisions is governed by the Administrative Procedure Act. *Lincoln Electric Co.* v. *Com'r* (June 5, 1947), rev'g 6 T.C. 37. The substantive issue in that case was the deductibility of annuity premiums and trust contributions made by the taxpayer for the benefit of employees. The Tax Court held these payments were not deductible because they did not constitute reasonable compensation for services. The Circuit Court held that irrespective of the correctness of that conclusion, the undisputed facts demonstrated that the payments were deductible as ordinary and necessary business expense. The Court held that a reversal was not precluded by the *Dobson* rule; to the contrary, the issue was one of law under the *Bingham* case.

Although the decision could have been grounded upon that reasoning alone, the Court went out of its way to discuss the effect of the Administrative Procedure Act. Pointing out that the Tax Court was but "an independent agency in the executive branch of the Government," the opinion states: "While our conclusion is that review of Tax Court decisions is governed by the Administrative Procedure Act, it does not become necessary, in view of our reliance upon the *Bingham* case, to particularize in what respect our power to review has been enlarged, except to say that it doubtless has been broadened and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review."

The holding that the review of Tax Court decisions is subject to the Administrative Procedure Act finds considerable support in the decision of the Supreme Court in a recent renegotiation case. In *Aircraft & Diesel Equipment Corporation* v. *Hirsch* (decided on June 16, 1947), the Supreme Court found that the plaintiff had not exhausted its administrative remedy but had brought suit in a federal Court before the Tax Court had redetermined the excess profits. An indication of the Supreme Court's attitude is the statement that, under the Second Renegotiation Act, the Tax Court's functions had to be fully performed "before judicial intervention should take place." Obviously, review by the Tax Court is not considered to be a judicial review.

A bill now awaiting Senate action (H.R. 3214) would make the Tax Court a part of the judicial branch of the Government and give it the status of a court of record. Should it become law, the Tax Court would be removed from the purview of the Administrative Procedure Act. That bill contains a provision, however, that Tax Court decisions should be reviewed by the Courts of Appeals "in the same manner and to the same effect as decisions of the District Court in cases tried without a jury." This latter provisions has received the active support of the officers of the Tax Section, in conformity with resolutions previously adopted by the American Bar Association.

A Reluctant Claim of Right

Does a taxpayer realize income when he is forced unwillingly to receive compensation for services rendered under protest by compulsion of a law believed to be unconstitutional? No, says the Court of Appeals for the District of Columbia, reversing the Tax Court in *Sohio Corporation* v. *Commissioner,* decided July 28, 1947. The Sohio Corporation, purchasing oil for distribution, was required by an Illinois statute carrying severe penalties to withhold from its Illinois vendor-producers an excise tax of 3% of the purchase price. The amount withheld was paid to the State, after deducting a service charge of 2% of the tax to compensate the withholding agent for its services as tax collector. Sohio joined with other interested parties in contesting the validity of the tax and three years later Illinois Supreme Court held the law unconstitutional.

The federal tax question concerns only the 2% service charge which Sohio held in its general funds throughout the litigation, at the same time protesting that the law under which it was collected was unconstitutional. The case involves an interesting application of the "claim of right" rule laid down in *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417. There a taxpayer was held to realize income when it received money under claim of right and without restriction as to its use, even though its claim was in litigation during the taxable year. Here the Court of Appeals found no income to Sohio holding the North American Oil Consolidated rule to be inapplicable.

The distinction is apparently in the record position of the taxpayer in the pending litigation. The taxpayer in *North American Oil Consolidated* v. *Burnet* was asserting its right to retain the funds in question; while here Sohio was vigorously contending that it had no such right. In the final analysis of course the rights of both taxpayers depended upon the outcome of the pending litigation; the funds would not be released unless the Court's decision so required. Nevertheless, the intermediate nature of the "claim" is controlling.

Bad Debts—"Business" Test

The 1942 Act introduced a drastic limitation upon the deductibility of bad debts. Unless the transaction involves a "debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business", the deduction is limited to a short-term capital loss. I.R.C. §23 (k) (4). In its first decision involving this "business" requirement, the Tax Court has indicated a liberal interpretation for taxpayers.

The taxpayer was a stock broker and a member of the New York stock exchange. He received a "dividend" of one-fourth of a seat in 1929, with the privilege of selling it. He made the sale partly on credit, but the purchaser became bankrupt in 1942, and most of the unpaid purchase price became worthless in 1943. The Bureau held that the loss was limited by the "nonbusiness" debt provision of the statute, because the taxpayer was not engaged in the business of selling seats on the stock exchange. The Court, however, rejected this narrow test. "The debt here in question was not the result of a loan by the petitioner to a friend or relative or an isolated transaction which bore no relation whatsoever to the business in which he was engaged, but, on the contrary, was closely related to the business of owning and using a stock exchange membership for the production of income. . . ." The deduction was therefore allowed in full. *Robert Cluett,* 8 T.C. No. 138.

The Present Practicalities of "World Government"

■ "If we were living in a world where the mere announcement of a desirable objective was sufficient to assure its achievement, every intelligent man and woman would enthusiastically support such objectives as those set forth by Mr. Emery Reeves and by his associates and followers. But unfortunately the world of today is of a wholly different character.

"The basic defect in the appeals for world government now being made by Mr. Reeves, Justice Owen J. Roberts, Mr. Humber and many others of the same school, is the fact that no form of world government can today be created in which both the Soviet Union and the United States will take part. The Soviet government has repeatedly and officially declared not only that it opposes any form of world government but also that an international organization such as The United Nations, to prove successful, must depend, at least during its initial period, upon the domination of all the rest of the world by the three major powers.

"There is no evidence which can lead an objective observer of American public opinion to believe that any considerable number, let alone a majority, of the people would support the entrance of the United States into a federal world government which subjects the determination of American security and of American foreign policy to any such form of federal world legislative body as that envisioned by most of these schemes."

—Summer Wells in *Where Are We Heading?* (Page 46).

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Our Younger Lawyers

by William R. Eddleman • Secretary, Junior Bar Conference

■ For the Annual Meeting of the Junior Bar Conference to be held at the Hotel Hollenden in Cleveland, its Council convenes at 9 o'clock on the morning of September 20. The Conference itself will meet promptly at 9:00 o'clock Sunday morning, September 21, at a breakfast, which will be attended by delegates from Junior Bar groups affiliated with the Conference. Peter N. Chumbris, Thomas F. Healy, and Thomas M. Raysor, all of Washington, D. C., are delegates from the District of Columbia. Loren E. Souers, Jr., of Canton, Ohio, President of the Ohio Junior Bar Section; William R. Van Aken, of Cleveland, Ohio's Junior Bar Conference state chairman; Arthur M. Sebastian, of Columbus, former Council member from the Sixth Circuit; and William T. Walker, of Akron, are the delegation for Ohio with Louis B. Conkle, from Marion, Samuel I. Krugliak, of Canton, John J. Johnston, Jr., of Wooster, and Roger H. Smith, of Toledo, as alternates.

John D. Bright, Jr., of Middletown, Chairman of the Junior Bar Section of the New York State Bar Association, reports that New York delegates include Philetus M. Chamberlain, of Rochester; Maurice F. Quinn, of Buffalo; Samuel C. Shoolman, of Rochester; and Henry W. Killeen, of Buffalo; with Daniel G. Kennedy, Edward Harris, Jr., John F. Skivington, Jr., and William T. Yorks, all of Rochester, as alternates. Paul Sullins has been designated by Terrell Marshall of Little Rock, Secretary of the Bar Association of Arkansas, to represent its Junior Bar Section.

E. B. Griffith, of Toronto, Canada, Chairman of the Junior Bar Section of the Canadian Bar Association, will speak at the opening breakfast at 9 a.m., Sunday, September 21. His remarks will be followed by the offering of recommendations by the delegates of local and State groups. The relationship of Junior Bar groups with local and State Bar Associations will be discussed by James E. Burns, of San Francisco, a member of the San Francisco Barrister's Club; Robert Bell, of Stamford, Connecticut; Frederick L. Hall, of Dodge City, Kansas; John E. Early, of Evansville, Indiana; George L. Frederick, of the Minneapolis Junior Bar; and J. E. Bindeman, of the District of Columbia Junior Bar.

Luncheon on Sunday will be featured by an address by former Governor Paul V. McNutt, now of Washington, D. C., lately High Commissioner to the Philippine Islands. The afternoon will be devoted to reports and recommendations of the various committees of the Conference.

On Monday, September 22, the Conference's Resolutions Committee will conduct open hearings and the Nominating Committee will convene to receive nominations. At 4:30 o'clock, in cooperation with the Association's Conference on Personal Finance Law, a mock legislative hearing will be participated in by James E. Burns, of San Francisco; Eugene C. Gerhart, of Binghamton, New York; Frederick L. Hall, of Dodge City, Kansas; and Albert W. Stubbs, of Columbus, Georgia.

On Tuesday, September 23, at 9:00 a.m. announcement of the Awards of Merit to the outstanding local and State Junior Bar groups will be made followed by the presentation of awards to the outstanding State and local Directors of Public Information by W. Carloss Morris, Jr., of Houston, Texas. There will be also an address by Dean Robert G. Storey, of Dallas, Texas; and the report of the Nominating Committee. At noon on Tuesday, the Conference, in cooperation with the Section of International and Comparative Law, will sponsor a luncheon at which former Governor Harold E. Stassen, and the Honorable John Foster, M. P., and former Counsellor to the British Embassy in Washington, D. C., will be guest speakers. While sessions of the Conference will be completed on Tuesday afternoon, many young lawyers will participate in the remaining sessions of the Annual Meeting.

James Stevens, of Chicago, is the new president of the Young Lawyers' Committee of the Chicago Bar Association.

The first application for Awards of Merit for the outstanding Junior Bar has just been received from the Florida State Bar of which Robert M. Barton, of St. Petersburg, is the retiring chairman. At the annual convention of the Florida group, Clyde C. Atkins, of Miami, was elected as the new President; John W. Roe, Clearwater, Vice President, Wallace Jopking, of Lake City, Secretary; and T. T. Turnbull, of Tallahassee, Treasurer.

A new Younger Lawyers' Section of the Georgia State Bar has been formed according to the report of Harry S. Baxter, Conference representative from Atlanta. Completion of a new Junior Bar Section in North Carolina, inspired under the leadership of Joseph W. Grier, Jr., of Charlotte, is planned for September.

The Junior Bar Conference of the California State Bar is in process of organization and has indicated that affiliation with the Conference is being considered. A plan of organization has been tentatively approved for the Junior Bar Section of the Connecticut State Bar Association and it is anticipated that application for affiliation will be received shortly.

Bar Association News

State Bar of California

■ Arrangements have been completed which provide for the holding of classes throughout the State for practicing lawyers in California. The program is the result of long-range planning between the State Bar of California, working through its Committee on the Continuing Education of the Bar, and the law schools of the State.

The classes, which will be administered by the University of California Extension, are designed to provide a means of keeping members of the Bar abreast of current developments in the major branches of the law, and particularly in the dynamic fields of taxation, labor-management relations, and administrative law. The first courses are planned to deal with taxation, and the program will expand as rapidly as local demand develops.

In announcing the project, Julius V. Patrosso, President of the State Bar of California, said: "We in the State Bar regard the long-range educational program which we are initiating in conjunction with the University of California Extension as one of the most important projects ever undertaken by the integrated Bar. Every profession has the obligation of systematically bringing to the attention of its members recent advances in their field, and this arrangement, we feel, will result in benefits for both the profession and the public."

Dean Edwin D. Dickenson, of the University of California School of Jurisprudence, is Chairman of an Advisory Committee as to the program. Deans of all accredited law schools in the State will serve on his Committee. Robert F. Kingsley, of the University of Southern California, is Chairman of the State Bar's Committee on Continuing Education of the Bar, and his Committee will cooperate on the project with the committee of deans.

Delaware State Bar Association

■ Marked progress has been experienced by the various committees of the Delaware State Bar Association during the past year. The long-term planning and laborious efforts of former officers and hard-working committee members have borne fruit.

The system of pleading and practice in force in the Superior Court, the law Court of general and civil jurisdiction, will be materially changed, effective January 1, 1948, to conform quite generally to the Rules of Civil Procedure in force in the District Courts of the United States. Much credit for this modernization goes to the Association's Committee for the Improvement of Justice and to the Advisory Committee. Heretofore a common law system of pleading such as existed in England before the adoption of the Hilary Rules in 1934 has been in effect.

During the year the Association was instrumental in the establishment of the Legal Aid Society of Delaware, a charitable corporation having a board of trustees of five members selected from the Bar. The Society, whose purpose is to render competent legal assistance to those who cannot afford to pay a practising attorney, is maintained exclusively from funds contributed by members of the Delaware Bar.

The Committee on General Legislation has a fine record for the year. Of the nineteen bills which it sponsored, seventeen were enacted into law in 1947. One of these was a measure which increased judicial salaries, and another is an amendment to the State constitution which will make the Vice Chancellor a constitutional judge.

Also during the year 1946-47 twenty-eight radio broadcasts over WILM, Wilmington, were presented by the Public Relations Committee. The programs featured talks by lawyers under the general title "The Lawyer Speaks." Many legal subjects were discussed, particular attention was paid to veterans' rights.

The long dispute as to the right to draw wills and trust instruments, as between lawyers and bankers, was amicably settled during the year as far as the State of Delaware is concerned when authorized representatives of both sides adopted their "Statements of Policies and Agreed Practices." Here again the State Bar Association took the lead in settling the problems.

Florida State Bar Association

■ Reformation of the Florida Civil Rules of Procedure and the integration of the Florida Bar were given top billing as major projects for the coming year by the Board of Governors of the Florida State Bar Association in their meeting at Orlando on July 8.

The Board agreed to take a vote by mail of all practicing attorneys in the State on the question of the integration of the Bar. If the vote favors integration, a petition will be presented to the Supreme Court of Flordia for integration of the Bar by Court rule. It is believed that the showing made by the voting will be given considerable weight by the Court in making its decision.

As to the reformation of the civil rules, the Committee on Rules was authorized to work with the Supreme Court Committee with a view to working out a set of rules that will be agreeable to both committees. A report will be made to the Mid-Winter Conference of Bar Delegates.

At the request of E. Dixie Beggs, Jr., President of the Association, the Board authorized the appointment of special committees to study the Uniform Sales Act and the Uniform Partnership Act and to make

recommendations with respect to securing the adoption of these two acts by the Florida Legislature.

The Board also voted in favor of having the Florida State Bar Association resume its affiliation with the Inter-American Bar Association.

The Legal Institute Committee was given the go-ahead to renew district legal institutes, first finding out from the local groups subjects and the types of program discussions that will best aid and interest their members.

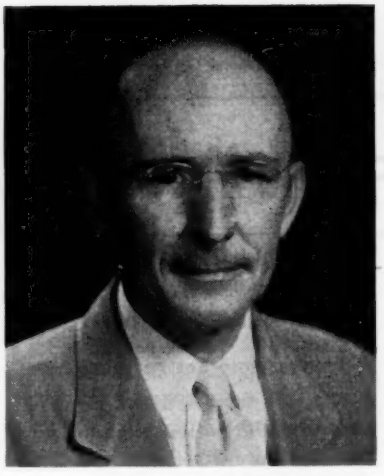
President Beggs also called attention to the excellent work of the Committee on Law Reporting, whose efforts were responsible for the passage of an act by the Legislature this year authorizing the printing of Supreme Court reports by a law book company, a procedure which will save the State and the attorneys considerable money and reduce the number of volumes on lawyers' shelves.

Georgia Bar Association

■ Open forum discussions on changes in the Federal Rules of Civil Procedure, the new Labor-Management Relations Act, the new Georgia divorce law and other issues of vital and practical interest to the Bar, will be held during a two-day fall meeting of the Georgia Bar Association which is now being planned for Atlanta under the direction of the Association's new president, Vance Custer, of Bainbridge.

A full year of activity designed to aid the Bar of the State in its service to the public is contemplated by Mr. Custer, who was elected President at the annual meeting of the Association in Augusta on May 29-31.

In this respect a special committee has been appointed in each of the three federal Court districts of the State to investigate and report on the suitability of all appointments to the federal Courts within the State. This committee was set up in response to inquiries from Senator Alexander Wiley, Chairman of the Senate Committee on the Judiciary, and it will work closely with the Senate group and with the American Bar Association's Committee in the field.



VANCE CUSTER

E. B. SMITH

At a recent meeting the Board of Governors of the Georgia Association approved a plan to make group life, health, and accident insurance available to its membership.

The newly-organized Younger Lawyers Section of the Association has been extremely active. It has accepted responsibility for solicitation for membership among lawyers newly admitted to the Bar and those who are returning to practice after service in the Armed Forces. A committee on assistance to law schools has also been constituted; this group will supply judges from among its members to preside at moot trials in law schools. Then too, the Section has offered to help the work of the Association's Committee on Legal Education and Admission to the Bar and the committee which is working on Georgia annotations to the Restatement of the Law. A survey and factual report on the minor Courts of the State will soon be made by a special committee from the Section. One of the most valuable and appreciated phases of the Younger Lawyer's work is the program for aid and assistance to lawyers upon their admission to the Bar, particularly in the matter of making library facilities available to them.

Other new officers of the Association elected at Augusta are S. Hawkins Dykes, of Americus, vice president; J. Wilson Parker, of Atlanta, treasurer; and R. Lanier Anderson, Jr., of Macon, secretary.

Idaho State Bar

■ At an annual meeting whose program was designed to be specifically practical for practicing Idaho lawyers, E. B. Smith, of Boise, was elected president of the Idaho State Bar for the second time. The conclave was held at Sun Valley on June 27 and 28.

Unification and reorganization of Idaho Courts came in for considerable discussion. It was the subject of a report by Marshall B. Chapman, of Twin Falls, and Hugh A. Baker, of Rupert. It was also dealt with by the retiring President, E. T. Knudson, of Coeur d'Alene, by Governor C. A. Robins of Idaho, by Barney Glavin, Speaker of the House of Representatives, and by Harry A. Elcock, President of the Idaho State Chamber of Commerce.

Colonel Frank E. Meek, of Caldwell, recounted some of the sidelights on War Crimes Trials in the Pacific.

Glenn R. Winters, of Ann Arbor, Michigan, Secretary of the American Judicature Society, spoke on "The Bar and Selection of Judges."

Everett E. Hunt, of Sandpoint, was elected Commissioner from the Northern Division, and R. D. Merrill, of Pocatello, was named Vice President for the ensuing year.

Those attending the meeting—one of the largest ever held—enjoyed the many recreational facilities offered by Sun Valley.

JOSEPH J. SUMMERILL, JR.

New Jersey State Bar Association

■ An examination of the role which lawyers must play in the troubled times of groping for peace on an international scale was made at the annual meeting of the New Jersey State Bar Association by Congressman Sam Rayburn, of Texas, former Speaker of the House of Representatives, and Carl B. Rix, President of the American Bar Association. The conclave was held in Atlantic City on June 13 and 14.

Mr. Rayburn's address was "Our Times—Our Responsibilities," while Mr. Rix spoke on "The Lawyer in Foreign Policy." Although attacking the subject matter from different angles, both speakers made their listeners realize that the problems of the post-war world present many facets within the province of lawyers especially.

Considerable interest at the meeting was aroused by a report of the Committee on Law Reform which proposed merger of the Chancery Court into a General Court. The matter was highly controversial in view of the fact that New Jersey is now holding a Constitutional Convention and that the separate Chancery Court may be eliminated by the new Constitution. Although the Committee on Law Reform urged adoption of their report, the Association membership rejected it, and there was substituted in its place a resolution referring the matter to a referendum of the membership.

[Thereafter 1715 ballots were mailed out and 1170 returned. Of these 583 were in favor of retaining a separate Court of Chancery and 547 advocated a change. The remaining ballots returned, although not defective, were too ambiguous to be tallied on either side. The closeness of the vote indicates the acute division of New Jersey lawyers on this issue.]

One of the highlights of the meeting was a mock trial of a tax appeal case in which Judge Marion J. Harron, of the Court of Tax Appeals of the United States, assisted. This mock trial proved highly informative to the well-attended meeting.

Joseph J. Summerill, Jr., of Camden, was elected president. Mr. Summerill has been a member of the American Bar Association since 1932. Other newly-elected officers are N. Louis Paladeau, Jr., of Jersey City, first vice president; Robert K. Bell, of Ocean City, second vice president; John H. Yauch, Jr., of Newark, third vice president; Edward T. Curry, of Camden, treasurer; and Emma E. Dillon, of Trenton, secretary (re-elected).

Mr. Summerill will stress integration of the Bar during his administration.

Illinois State Bar Association

■ William M. James, of Chicago, was elected president of the Illinois State

WILLIAM M. JAMES

H. GRADY CHANDLER

Bar Association at its annual meeting in Cairo on June 5 and 6. During the meeting addresses were given by Carl B. Rix, President of the American Bar Association, Kaywin Kennedy, Bloomington, retiring President of the Association, and Ralph M. Snyder, secretary of the Association, who spoke for the Section on Legal History and Biography.

One of the highlights of the program was the Senior Counsellor ceremonies in which members admitted to the Bar in 1897 were honored.

The new president was educated at the State University of Iowa and Chicago-Kent College of Law and was admitted to the Bar in 1925. A veteran of World War I, he is in practice in Chicago and has been an instructor at Chicago-Kent since 1925. He was chairman of the committee which drafted the Illinois Probate Code and was editor-in-chief of *Illinois Probate Act Annotated*, which the Association published in 1940. He has assisted the Veterans' Administration in drafting legislation designed to expedite handling of veterans' affairs.

State Bar of Texas

■ A program emphasizing section meetings, with one day set aside exclusively for such conclaves, was enjoyed by the State Bar of Texas at its annual meeting held at Dallas on July 3-5. The meeting attracted a

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registered attendance of over 1600.

A need for more clinical training in law schools was pointed out by the retiring president of the Bar, James L. Shepherd, Jr., of Houston, in the annual address of the president.

The section gatherings included meetings of the State Junior Bar of Texas, the District and County Attorneys Section, the Taxation, Trade and Commerce Section, the Mineral Law Section, the Insurance Law Section, and the Section on Local Bar Association Activities. In the Mineral Law Section, Price Daniel, Attorney General of Texas, discussed the recent tidelands decision in the U. S. Supreme Court (*U. S.* v. *California*).

H. Grady Chandler, of Austin, was elected president of the Bar for 1947-48. A veteran of World War I, he was graduated from the University of Texas with an LL.B. degree in 1916 and was admitted to the Texas Bar in that year. He has practiced in Farmersville, McKinney, Tyler, and in Austin since 1935. He was Assistant and First Assistant Attorney General of Texas in 1927-30 and 1935-39. The University of Texas claimed his services as a Professor of Law from 1930 to 1933.

The new vice president is Guy Rogers, of Wichita Falls.

An outline of the American Bar Association's proposed Survey of the Legal Profession was given during the meeting by Dean Albert J. Harno, of the University of Illinois College of Law. (See 33 A.B.A.J. 653; July, 1947).

Other principal speakers at the general sessions and luncheons were Carl B. Rix, of Milwaukee, the American Bar Association's President, who spoke on "The Lawyer in Foreign Policy;" Judge John J. Parker, of North Carolina, on "Improving the Administration of Justice;" and Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, on "Appreciating and Preserving the American System of Government and the Court System."

At the annual dinner held on the last night of the meeting Harry W. Colmery, of Topeka, Kansas, spoke on "National Security and Military Training," and Beauford H. Jester, the Governor of Texas, reviewed "Legislation in the 50th Legislature of Texas."

1 Federal Tort Claims Act

(Continued from page 860)

Liability for "Negligent or Wrongful" Act or Omission

It may be significant that the Act imposes liability for a "negligent *or* wrongful act or omission," thus indicating that there may be a right of action without negligence. One of the exemptions is, that no claim may be based on an act or omission of an employee, *exercising due care,* in the execution of a statute or regulation, whether the statute or regulation be valid or not. The implication is that such acts or omissions, *if negligent,* are not exempt from the operation of the Act; and further, that such acts or omissions, *even in the exercise of due care,* might be actionable but for the exempting provision. If this be a sound conclusion, does it not necessarily follow that Congress intended that liability results from any non-exempt wrongful act or omission (that is, any non-exempt invasion of the legal right of an individual) whether or not the act or omission be negligent?

Examples may be found of acts which are tortious, in the sense that they constitute wrongful invasions of legal rights, without being negligent. Maintenance or use of ultra-hazardous instrumentalities which cause injury is actionable between individuals, irrespective of negligence in their operation.[37] This rule has been held to include the storing and transporting of explosives,[38] and would probably extend to the operation of airplanes,[39] or exceptionally large and heavy motor vehicles.[40] It may be that liability in such cases is grounded on ownership of the instrumentality, rather than on the act of the agent who maintains or operates it; but even so, it is not hard to visualize instances of claims against the Government which will call for judicial construction of the ultra-hazardous rule as applied to this Act. In fact, the Government probably maintains and operates more hazardous instrumentalities than all private individuals combined in connection with the military and naval establishments.[41]

There is also the rule of liability in tort for the maintaining of a nuisance.[42] This kind of tort is regarded, in some of its phases, as an example of what may be called "liability without negligence."[43] The liability is based not on lack of care in the use or operation of the thing which causes the injury, but on the inherent nature of the thing itself, which makes it a nuisance, and therefore a violation of individual legal rights. An agent whose act causes a nuisance which is actionable is individually liable,[44] and such liability would extend, of course, to his principal. Would the government be liable under the Act, in circumstances which would give rise to liability against an individual principal for the act of his agent in maintaining a nuisance?

Cases have already occurred in which claims have been filed with

37. 3 *Restatement, Torts,* §519 *et seq.*

38. *Exner et ux.* v. *Sherman Power Const. Co.,* 54 F. (2d) 510; 3 *Restatement, Torts,* §520, Comment on Clause (a): c.

39. See Uniform State Law for Aeronautics; 3 *Restatement, Torts,* §520, Comment on Clause (a): b.

40. 3 *Restatement, Torts,* §520, Comment on Clause (b): e.

41. See *Rickman* v. *E. I. Dupont De Nemours* & Co., 157 F. (2d) 837, holding that the manufacture of the atom bomb is extrahazardous under the Washington State Workmen's Compensation Act.

42. See 4 *Restatement, Torts,* §822 *et seq.*

43. See Harper: *Law of Torts,* §179 *et seq.; Terrell* v. *Chesapeake & O. Ry. Co.,* 110 Va. 340, 66 S. E. 55; *Chesapeake & O. Ry Co.* v. *Greaver,* 110 Va. 350, 66 S. E. 59.

44. See 4 *Restatement, Torts,* §834, Comment d.

governmental agencies for damages alleged to be due to negligence of Government officers purported to have caused loss to contractors in the performance of their contracts with the Government.[45] This may prove to be a fertile field for litigation under the Act.

The Act Means Increased Respect for Government and Law

Despite the serious difficulties and problems that may confront the bench and Bar in the application, interpretation and administration of the Act, it must be recognized as a significant step forward in the progressive effort to improve, and ultimately to perfect, the administration of justice in our National Courts. It represents the virtual abandonment of a policy which was incomprehensible to many, and it will doubtless increase respect for the Government in the minds of the people.

The words of the Englishman, Frederic William Maitland, uttered many years ago, may now be repeated with new force and meaning: "It is a wholesome sight," he said, "to see 'the Crown' sued and answering for its torts."[46] No longer need we as judges strain common sense and sound reason to sustain the antiquated legal fiction that "the King can do no wrong." Except in those cases which touch purely governmental functions, which are amply protected by the exemptions in the Act, the citizen may now litigate his rights as against his Government, on equal terms.

45. Comp. Gen. Dec. B-60391, May 6, 1947; 15 L. W. 2636.
46. 3 *Collected Papers* 263.

Liability of the United States in the Absence of Proof of Negligence by Its Agents

by **W. R. C. Cocke** • of Norfolk, Virginia

■ As far as I can ascertain this phase of the law has not yet been the subject of decision by any federal Court.

The Act imposes liability "on account of damage to or loss of property, or on account of personal injury or death caused by the negligent or *wrongful* act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred." The expression "Employee of the Government" includes officers or employees of any federal agency and of the Military and Naval forces and persons acting on behalf of a federal agency in an official capacity.

While a limited number of categories of acts and omissions of the Government or its agents are excepted from the operation of the Act, it is evident that its purpose of the statute was to place the Government in the same position and subject it to the same liability for the acts of its employees as that of individuals or corporations in respect of the great majority of tort claims of all descriptions.

Subject of course to its limitation to torts causing damage to or loss of property, or personal injury or death, which necessarily exclude types of tortious injuries in addition to those expressly excepted from the operation of the Act and which greatly restrict the scope of torts covered by the Act, I conclude that it was the intent to impose liability in respect to tortious acts whose legal consequences are not predicated upon negligence of the tort feasor. I have not been able to find anything in the record of the hearings or Congressional debates to throw light on this point.

Examples may be found of acts which are tortious in the sense that they constitute wrongful invasions of legal rights without being negligent. The Act provides the distinction in imposing liability for a "negligent or *wrongful* act or omission." If it had been intended to restrict liability to acts requiring proof of negligence, the use of "wrongful" would have been unnecessary. Effect should be given to the cardinal rule that significance shall, wherever possible, be accorded to every word of a statute and that the legislature is presumed to have used no superfluous words. *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 58 L. ed. 658; *Platt* v. *Union P. R. Co.*, 99 U. S. 48, 25 L. ed. 424; *Winborg* v. *United States*, 163 U. S. 632, 41 L. ed. 289. And no word should be rejected if it can be given meaning. *United States* v. *Howell*, 11 Wall. 432, 20 L. ed. 195; *McDonald* v. *Thompson*, 305 U. S. 263, 83 L. ed. 164.

In discussing the nature of negligence, Street (*Foundation of Legal Liability*, Vol. I, page 72) refers to three distinct bodies of wrongs (among others): "negligence in the field of primary and secondary trespass; malice in the field of malicious injury; and fraud in the field of deceit." Cooley (*Fourth Ed.*, Vol. I, Sec. 44, page 85) states that one becomes a wrongdoer: (1) By actually doing to the prejudice of another something he ought not to do; (2) by doing something he may rightfully do, but wrongfully or negligently doing it by such means or at such time or in such manner that another is injured; (3) by neglecting to do something which he ought to do whereby another suffers injury. He then proceeds to say: "The first is the active wrong; the others are usually the wrongs of negligence." Negligence is defined as an unintentional breach of a legal duty; it is the absence of an intent to inflict

the injury which distinguishes negligence from other torts. *Standard Marine Ins. Co.* v. *Nome Beach L. & T. Co.*, 133 Fed. 636 (C.C.A. 9th).

Among the categories of torts which do not involve the concept of negligence are assault and battery, wrongful attachment, conspiracy, false imprisonment, deliberate interference with legal rights, libel and slander, malicious prosecution, nuisance, certain types of breaches of trust, fraud, breaches of confidential relations and non-performance of statutory duties. Although parts of these categories fall outside the restriction of the Act to damage to or loss of property or personal injury or death, and others are expressly excepted, others are within the purview of the Act; i.e. nuisance or wanton and deliberate injury to person or property, patent infringement, etc.

Use in statutes and decisions of the expression "negligent or wrongful act" has been frequent over many years. It has been employed in statutes providing liability for so-called wrongful death from the time the American States began to adopt the principles of Lord Campbell's Act. In discussing a statute of Kentucky imposing liability for death resulting from "the negligent or wrongful act" of another, the Kentucky Court in *Howard Adm'r.* v. *Hunter*, 104 S. W. 723, held that, "as the word 'negligence' has a limited meaning, the words 'wrongful act' were used to embrace every injury that might be committed against the person, whether negligently done or not". In *Randle* v. *Birmingham Ry. Light & Power Co.*, 53 So. 918 (Ala.) there is an elaborate discussion of the distinction between the words "negligence" and "wrongful act" as used in the Alabama Homicide Statute.

Significantly the Act includes in the definition of "employees" of the Government, the employees of any federal agency as well as members of the military and naval establishments. The multiplicity of federal agencies and of their business activities are now so ramified throughout the entire field of economic relationships that wrongs of Government employees can occur within many of those categories of torts already mentioned which do not involve the concept of negligence. It is true that to render the Government liable the employee must, under the express words of the statute, have been "acting within the scope of his office or employment"; but that limitation is little, if any, different from the long-existing rule that to render the principal liable for the act of an agent it is generally necessary that the agent should have acted within the scope of his employment.

While the decisions indicate that the distinction between torts of negligence and torts of other kinds is of universal application, liability under the Act is to be determined in accordance with the law of the place where the act or omission occurred. Accordingly, any special or peculiar features of the governing common or statutory law of the place of injury must be taken into consideration in connection with the general distinction between torts of negligence and other varieties of wrongs. The note which discusses almost every feature of the Act (*Yale Law Journal;* February, 1947; pages 534-561) does not take up our present question but agrees in the conclusion that the words "negligent or wrongful act or omission" are intended to establish the broad basis of the Government's liability as including all causes of action which would lie in tort against a private litigant.

Evidence and Admissions of Government Employees Under the Act

by Robert S. Spilman • of Charleston, West Virginia

■ Judge Moore has pointed out that in trials under the Act questions of evidence will be presented which will not be easy to answer, and he has asked for comment as to evidence generally, with particular reference to admissions by Government officers and employees. Judge Moore asks: "To what extent, if at all, is the Government to be bound by admission of its officers? *Will the rule be the same as that applicable to corporations generally?*" . . .

A lawyer may well hesitate to assume the risk of becoming a member of that familiar class of trespassers who rush in where even the immortals fear to tread. The hazard is increased by the fact that there are no decisions to supply precedent. By the Act Congress declared that the United States is liable for damages suffered by a plaintiff "caused by the negligent or wrongful act or omission of any employee of the Government," etc. Thus the immunity, formerly existing, of the United States from such liability is withdrawn. The Government becomes liable for the torts of its officers and employees only to the extent that Congress has imposed liability by provisions of the Act. This suggests an analogy between the status of the Government under the Act and that which the Courts have assigned to municipal corporations (*Trenton* v. *New Jersey*, 262 U. S. 182, 191) in respect of their private or proprietary transactions.

The dual nature or capacity of municipal corporations is now widely recognized. In earlier days in most jurisdictions, municipal corporations were held to be immune from liability in tort in all cases, a doctrine which apparently still prevails in at least one State of this Circuit. *Farrow* v. *Charleston*, (S. C.), 168 S. E. 852 (1933). This immunity rested upon the theory that municipal corporations were arms or agencies of the States by which they were created, and as such possessed the immunity

from liability in tort attributable to the States themselves. But as municipal corporations engaged progressively in activities clearly beyond the scope of their governmental functions and duties, and cases repeatedly arose where a citizen suffered damage to person or property because of the negligence of municipal officers or employees in the course of such private activities, the Courts, while still recognizing the immunity of municipal corporations to damages occurring in the course of the exercise of a public or governmental function, evolved and originated the doctrine that a municipal corporation acting in a private or proprietary capacity becomes liable in tort in the same manner and substantially to the same extent as a private person or corporation. Lile's *Notes on Municipal Corporations*, page 86; *1 Dillon Municipal Corporations* (5 Ed.), Sec. 109.

Following this trend, these Courts have held broadly that the doctrine of estoppel may be invoked against a municipality in respect to acts done in its proprietary or private capacity, and that such estoppel may be predicated upon the conduct of its officers or agents acting within the scope of their authority. 38 *Am. Jur.—"Municipal Corporations"*, Sections 572, 668, 669. Where the injury complained of is one for which the municipality is liable, the doctrine of *respondeat superior* applies to acts and statements of officers or employees appointed by the municipality, subject to the same limitations which govern the admissibility of such evidence in actions against a private corporation or individual.

What the applicable limitations are in such cases is a matter far beyond the scope of my comment here, to be determined by established principles of the law of agency and evidence. My sole point here is that in cases under this Act, the Government by divesting itself of immunity may have placed itself substantially in the same position, not only in respect of the substantive law, but as well of the law of evidence, as that in which a municipal corporation finds itself when it is defendant in a tort action arising out of the performance of its private or proprietary affairs; and that there is respectable authority for the proposition that the same rules of evidence, including those governing admissions of agents and officers, apply to a defendant municipal corporation in such actions as apply in like case to a defendant private corporation. It would seem to follow, if these premises be sound, that the same rules and principles of evidence will apply generally to actions against the Government under this Act as would apply in like circumstances in an action against a private corporation in the same jurisdiction.

"The Law of the Place" Provisions of the Act

by Roszel C. Thomsen • of Baltimore, Maryland

■ The Act provides that the United States shall be liable "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred." It provides further that practice and procedure in cases arising under the Act shall be in accordance with the Federal Rules of Civil Procedure.

These provisions mean that matters of substance shall be governed by the law of the place where the act or omission occurred and matters of procedure by the Federal Rules. But it is not always clear whether a particular point is a matter of substance or a matter of procedure. As to whether the burden of proof as to contributory negligence is on plaintiff or defendant in a particular case arising under this Act, two subsidiary problems are presented:

1. Is the question one of substance or of procedure?

2. What law governs in determining whether it is one of substance or of procedure? The latter must be determined by the Court before it can answer the former; the Court must first determine what "conflict of laws" rules it will apply.

The Restatement, Conflict of Laws—Section 584—states the general rule to be: "The Court at the forum determines according to its own conflict of laws rule whether a given question is one of substance or procedure." The Supreme Court in *Klaxon Company* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, and *Griffin* v. *McCoach*, 313 U. S. 498, held that in diversity of citizenship cases the rules of conflict of laws which govern are those of the State in which the Court sits. Cases under the Federal Tort Claims Act are not diversity of citizenship cases. It would appear that in cases arising under it the federal Courts would be inclined to follow the general rule and to determine according to *their own* conflict of laws rules whether a particular question is one of substance or of procedure, so that all federal Courts, wherever they sit, will be governed by the same rules in determining whether the burden of proof on the question of contributory negligence shall be considered a matter of substance and controlled by the law of the place where the act or omission occurred or a matter of procedure controlled by federal law.

We then come to the problem of what questions are of substance and what are matters of procedure under the federal conflict of laws rules. The form of action, the determination of the time when action is begun, all matters of pleading, the conduct of proceedings in Court, the competency and credibility of witnesses, and the admissibility (but not the relevancy) of particular evidence, are generally held to be matters of procedure. But the proof in Court of the facts alleged, and the presumptions and inferences to be drawn from evidence, present more difficult problems. The *Restatement* states the general rule to be that these are governed by the law of the forum. It is by no means certain that that is the federal law. As to the burden of proof on contributory negligence, the Supreme Court in *Central Vermont R. R. Co.* v. *White,* 238 U. S. 507, the Court said that "It is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure." In *Lachman* v. *Pennsylvania Greyhound Lines,* 160 F. (2d) 496, the Circuit Court of Appeals for the Fourth Circuit had to determine whether the applicability of the doctrine or rule of *res ipsa loquitur* was a matter of substance or of procedure. The opinion was written by our esteemed chairman, Judge Dobie. I was right interested to see what Judge Dobie would call it. In one paragraph he called it a doctrine and in the very next paragraph he called it a rule, so I guess that in this Circuit we can call it whatever we want, without fear of correction from the bench. Judge Dobie held that "The rule of *res ipsa loquitur* is not a rule relating to the burden of proof and its application does not result in shifting the burden of proof."

In determining the questions that arise, the Courts will no doubt gi e effect to the comment of Professor Beale: "In each situation the task of the Court remains the same: There must be a balancing of the interests of the parties, the Court, and the respective States. If the practical convenience to the Court in adopting the local rule of law is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held to be controlling. If the situation is reversed the rule of the foreign law will be adopted."

Right to Join Individual Defendants with the United States

by **Bryce R. Holt** • (of Greensboro, North Carolina)

■ In a recent article Irvin M. Gottleb goes into the legislative history[47] as well as other considerations against joinder. The House Committee on the Judiciary in its Report on H. R. 181 (79th Cong., 1st Sess., 1945), identical with Section 411 of this Act, after stating that the District Courts should exercise the same jurisdiction as the exercise concurrently with the Court of Claims of the United States under the Tucker Act, stated that "The bill, therefore, does not permit any person to be joined as a defendant with the United States . . ." and cited a District Court opinion in support.[48]

Always in the discussion of the joinder of parties defendant with the United States under this Act the right of trial by jury by the third party and certain of the Federal Rules of Civil Procedure, particularly those relating to the joinder of parties, come in for discussion. This was considered in *Lynn* v. *United States,*[49] under the Tucker Act. The Circuit Court of Appeals for the Fifth Circuit disallowed the joinder of the United States with the TVA. The appellant had contended that Rule 20, on the joinder of parties, authorized such a joinder. The United States, in the lower Court, had moved to dismiss on the ground, among others, "for misjoinder of the Tennessee Valley Authority likely to cause confusion about a jury trial". The opinion pointed out that under the Tucker Act a jury is not allowed and is not demandable under the Seventh Amendment.

The Circuit Court of Appeals for the Second Circuit did not follow the reasoning in the *Lynn* case, by *Sherwood* v. *United States,*[50] it held that a third party could be joined with the United States. A discussion of the bearing of the Rules on the right of joinder of parties defendant with the United States is in the opinion of that Court. The United States argued that the new Rules did not apply under the Tucker Act, but the Court rejected this, in line with the reasoning of Judge Chesnut in *Englehardt* v. *United States.*[51] The Court said in the *Sherwood* case: "We are cited to the high authority of *Lynn* v. *United States* . . . and the Court there seems prepared to go to the length of holding the Rules wholly inapplicable to the Tucker Act cases . . . With all deference we cannot go so far".

The Supreme Court granted certiorari in the *Sherwood* case[52] to determine the jurisdiction of the Dis-

47. Irvin M. Gottleb, of the Claims Division, Department of Justice, "*The Federal Tort Claims Act Statutory Interpretation.*"

48. *McMichael* vs. *United States,* 63 F. Supp. 598 (N. D. Ala.; 1945).

49. *Lynn* vs. *United States,* 110 F. (2d) 586 (C. C. A. 5th; 1940).

50. *Sherwood* vs. *United States,* 112 F. (2d) 587.

51. *Englehardt* vs. *United States,* 69 F. Supp. 451.

52. *United States* vs. *Sherwood,* 312 U. S. 584.

trict Court under the Tucker Act and finally held that the Court did not have jurisdiction and thus reversed the Circuit Court. The language of the Court seems also to reject the reasoning of the Circuit Court's opinion on the right of joinder. In its opinion, delivered by Justice Stone, it was pointed out that the "United States as a sovereign is immune from suit save as it consents to be sued and the terms of its consent to be sued in any Court define that Court's jurisdiction to entertain the suit". The Court further pointed out that the Tucker Act "must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."

Exceptions to Tort Liability of Government under the Act

by **Dean Samuel L. Prince** • of the University of South Carolina Law School

▪ The exceptions are to a large extent named specifically in the Act. It is new for Congress to establish in the substantive law a wholly new cause of action sounding in tort. Being in derogation of the common law it no doubt will be construed strictly. Particularly are we concerned with the liability of the principal for the tort of its agent when the principle is the United States. The Act does not add to or take from the liability of a person who is an agent for the Government or otherwise, but makes the Government liable for the tort of its agent where, if a private citizen had been the principal he would have been liable for the tort of his agent.

There are exceptions to the liability of an agent. He is not always liable in the exercise of a governmental function even though his conduct may produce damage. There is no liability upon a citizen who is lawfully exercising a governmental function and acting within the scope of his official duties, even though he acts wantonly or maliciously. *Cooper* v. *O'Connor*, 99 F. (2d) 135 (cert. denied, 59 Sup. Ct. 146).

The mere statement of the new liability of the Government necessarily states an exception. An agent is liable if he violates some duty which he has as an ordinary citizen, even though at the time he is pursuing a governmental mission and acting in *furtherance* thereof. The most common of such duties for the violation of which he would be liable would be the duty of care in the driving of a motor vehicle. In addition, the Act sets out twelve exceptions which really break down into many more, but arrange themselves into three classes. The first of these are represented by certain fields of torts which the Government refuses to enter:

1. "(a) First portion of subdivision (a) of Section 421: Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."

2. "(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

3. "(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

4. "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

5. "(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system."

The second of the three classes of specified exceptions are certain fields where the Government would keep intact a certain already existing method of handling claims:

1. "(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States."

2. "(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended."

3. "(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters."

4. "(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

5. "(k) Any claim arising in a foreign country."

6. "(l) Any claim arising from the activities of the Tennessee Valley Authority."

This last exception of the Tennessee Valley Authority gives me concern. I assume the Authority has machinery for determination of claims against it, but I have not yet found where Congress has set up machinery for handling such claims.

The third class of these exceptions are certain claims that would not in my opinion be included, but probably were stated to show their exclusion:

1. "(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

2. "(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States."

When these exceptions are considered, we are left in the field of negligence of governmental agents in (a) the operation of motor vehicles; and (b) the maintenance, operation, and control of highways, bridges, public lands, building, and structures of all kinds.[53]

53. See, also, articles in *New Jersey Law Journal* (September, 1946); *Minnesota Law Review* (Vol. 30—No. 3; page 133); *Ohio State Bar Association Reports* (Vol. XIX—No. 35; page 487); and the Report of the Senate Committee.

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The obstacles to agreement on granting powers over non-political international legislation might not prove too formidable. Possibly some changes in the national constitutional law of federal states such as the United States of America would be necessary; that they could be made is not open to question. When it is remembered that the powers so given to the General Assembly could be as carefully limited to subjects of international as against purely national concern as the powers of the federal government of the United States are limited to topics of national concern, it is apparent that the General Assembly would have a broad area in which to legislate without encroaching upon national legislative matters at all.

Aside from the improvement in non-political international legislation by accelerating the extension of its scope, definitive legislative action by the General Assembly would mean that a single legislative enactment on any given subject would govern all nations. Where the more cumbersome practice of a multipartite instrument requiring individual ratifications has been followed different countries have varied the impact of the legislation by the manner in which they have adopted it,[21] whether by enactment of the treaty in full as part of the national law or by amending the pre-existing national law to approximate the provisions of the treaty or in some other way.[22]

Even though non-political international legislation by the General Assembly of the United Nations promises substantial achievements, political international legislation is a very different matter, or as Professor Gutteridge has written in a very similar connection: ". . . Codification of the rules of public international law . . . depends, in any event, on considerations of a different order from those prevailing in the domain of private law."[23] What these considerations are will appear after a brief view of legislation by legislative bodies.

Legislation by Legislatures

Different as they are, the essence of national and international legislation is described in the terse statement of John Austin: "Legislation;—the science of what *ought to be done* towards making good laws, combined with the art of doing it."[24]

Where the doing is centered in a legislative body with the element of ratification limited to the possibility of an executive veto, the traditional principles governing the legislative process come into play and limit what may be accomplished under various political conditions.

The historical evolution of legislatures is of interest in this connection, not because the history of legislative activity will reveal its future but because by describing what has occurred under given conditions history does delimit what is probable under similar conditions in the future from what is improbable. The legislative function was not originally recognized as separate from the executive function; kings or oligarchs decreed the laws as well as administered them. Even after sizeable executive agencies came to carry the main burden of formulating general

21. "International treaties setting legislative standards invariably are so phrased as to require domestic legislation for their effectuation . . ." Freund, *Legislative Regulation: A Study of the Ways and Means of Written Law* 143-144 (New York: The Commonwealth Fund, 1932).

22. For a discussion of typical difficulties in international maritime legislation see Colombos, "The Unification of Maritime International Law in Time of Peace" 25 *Brit. Y. B. Int'l L.* 96 (1944).

23. Gutteridge, *op. cit. supra* note 9, at 37.

24. Quoted in Brown, *The Austinian Theory of Law* 246 (London: 1906).

rules for society, the executive continued to control their issuance. Although legislative bodies have long existed in Europe, such as the French Estates-General, the Spanish Cortes and the Russian Duma, and the British Parliament has a proud history of centuries, every such legislative agency has existed for long periods before acquiring actual legislative functions.[25] Such bodies first acquired a status separate from the executive; their advice came to be sought by the executive, much later their formal concurrence; and only in the past several hundred years in the case of Great Britain, for example, has Parliament itself originated legislation.[26]

What is seen from this process of gradual accretion of legislative powers and functions is the broad gap between the existence of a legislature and its effectual exercise of legislative powers. It is amusing to sophomores in political science to speculate on whether the English Parliament in medieval times could have originated legislation to determine the issues that divided society. There can be no doubt that any such efforts by Parliament in those times would be so fantastic in view of the mores of society and the conditions of political life as to have no more effect than a Resolution of the United States Congress today that the kingdom of God is at hand.

It is possible, on the other hand, that by continuing along the lines of the international conferences which have formulated successfully essentially non-political legislation even so new a body as the United Nations General Assembly might acquire some experience and facility in legislative technique by dealing with issues in which national viewpoints are less contrasting and "national honor" and "security" are not so intimately involved. It is to be anticipated, moreover, that a record of solid achievement in the non-political field might over the course of years make it feasible for the Assembly to move gradually toward the line dividing non-political from political legislation and one day to cross it. That is the fashion in which legislative bodies in the past have customarily assumed legislative functions, not by a great resolution to do so but by a series of minor activities which at last amounted to the same thing. Exceptions, as in the case of the organization of the United States Congress after the adoption of the Constitution, only point up the difference between an aggregation of thirteen homogeneous states and more than half a hundred diverse nations. Even the First United States Congress had behind it the Continental Congresses and the Confederation and individual states had a much longer experience with provincial legislatures of one type or another.

Not only does the past development of legislative bodies indicate that effectual exercise of legislative functions ordinarily comes long after such a body is first constituted, but there is a basic constituent in all of those legislative bodies which originate legislation. Such a legislative body must represent a deep-seated consensus within the polity for which it acts, an acceptance not necessarily of the entire existing political and economic structure but at the very least of the rules of what may be called political fair play which limit the way in which the political and economic structure may be altered. So basic is this characteristic of political fair play that mention of it will seldom be found in the debates of the United States Congress. Although the Labour Party in Great Britain, to take another example, has already launched its program to change the nation from a capitalist to a socialist state, the Labour Cabinet and its Members of Parliament accept the legislative technique developed under capitalism as the proper means to their end. There is no question but that the Labour Party would accept a defeat at the polls or a vote of loss of confidence from the House of Commons and retire in favor of a party with very different economic objectives. Under these conditions Members of Parliament need not debate the underlying principles of the British Constitution; instead they discuss specific, practical measures in all of which the present constitutional structure is implicit.

What this spirit of political fair play means when so vital a measure as the nationalization of the coal mining industry was under consideration is worth noting carefully. Although all of the Members were by no means for it and many vehemently and bitterly opposed, after full debate, amendments offered by the Opposition and an affirmative vote by the Labour majority, even the sharpest critic of the Government accepted the fact that the mines would be nationalized. There was no thought that a Member from a constituency in Wales who opposed the bill, for example, could keep the act from affecting that district or by his obduracy could block indefinitely the application of the act to coal mines elsewhere. The Conservatives and the Liberals and Labour agreed without even having to voice the agreement that a decision of the majority reached after full and free discussion must inevitably bind all.

What the absence of this spirit of political fair play means to the legislative process is vividly illustrated by the weakness of the legislative process in a number of legislatures on the continent. Both before World War II and now the French legislature, for example, has attempted to function without any genuine agreement among its members as to the rules of political fair play, and one consequence, the fall of France in 1940, is perhaps a grim preview of what may lie ahead. Communists on

25. ". . . For parliaments existed centuries before they made statutes . . . *Statutes* with us are recent; *legislatures* making statutes are recent everywhere; legislatures themselves are fairly recent; that is, they date only from the end of the Dark Ages, at least in Anglo-Saxon countries." Stimson, *Popular Law-Making. A Study of the Origin, History, and Present Tendencies of Law-Making by Statute* 3 (New York: C. Scribner's Sons, 1910).

26. On the history of legislation see Ilbert, *Legislative Methods and Forms* Chs. I-V (Oxford: Clarendon Press, 1901) and Luce, *Legislative Principles, The History and Theory of Law-making by Representative Government* (Boston: Houghton Mifflin Co., 1930).

the extreme Left and members on the extreme Right make the legislature a battleground on which to pit their ideologies and not a forum in which clashing views are harmonized by compromise and a majority decision is reached in which the minority is respected. Germany before World War II and Italy and Belgium today offer other discouraging examples of legislatures with ample powers struggling almost hopelessly over proposed political legislation.

The Continental legislatures referred to, for all of their desperate shortcomings, are far more integrated and united than the General Assembly of the United Nations can become merely by the acquisition of new powers. These established legislatures have national traditions to counter the divisive fury of Left and Right and a not entirely forgotten past of legislative activity on the Anglo-American pattern.

No "international traditions" yet support the United Nations Assembly. If any tradition may be said to exist, it stems from the League of Nations, which neither of the two mightiest Members of the United Nations wishes to remember.

Although granting powers to the General Assembly must appeal to Americans and Britishers as a noble enterprise deserving the fullest cooperation, no such reaction can be expected from all of the other Members. The practice of legislation by a free legislative body is not at all common in South America, for example; China has a party dictatorship with the legislative forms only recently utilized; the Union of Soviet Socialized Republics has a vast and symmetrical hierarchy of bodies legislative in name but devoted merely to the blind ratification of executive decrees. The representatives of such countries can scarcely be expected to learn in a few years and far less to accept and practice the delicate and intricate process of legislation by legislatures. If, indeed, representatives of these countries will accept the principle of legislation by the United Nations General Assembly on non-political matters and cooperate to make it effective in place of the old system of multipartite treaties, a tremendous step toward an effective, full-fledged world legislature will have been taken.

There are inescapable implications in any plan to grant powers over political international legislation which point up the futility of granting powers where the requisite philosophy of legislation is lacking. Who will claim that if the Soviet Union today had sufficient Communist-dominated satellites to ensure its control of a majority vote in the General Assembly, it would hesitate, under the powers proposed to be granted to the Assembly, to legislate an international program on atomic energy which would coincide with their program to date and not that of the United States? Could a Soviet bloc in such a General Assembly be expected to decide international economic issues with the solicitude for the capitalist minority Members which would normally be the case where legislation by legislatures is practiced?

Even though powers might be granted formally to the General Assembly to take legislative action not only in the field where non-political international legislation has begun but also in political matters, it is believed that no improvement in political international legislation would follow and much that is now painfully being projected toward international legislation in the political field, as in the control of atomic energy, would be swept away. The tension engendered in an attempt to legislate on essentially political matters in the General Assembly would contribute directly to the state of international disorder which it is the design of international legislation to avoid.[27]

Improvements in the multipartite treaty technique certainly are necessary, and their accomplishment is essential to the improvement of political international legislation.[28]

The sponsorship of international legislation by the United Nations has already revived what was dormant during the years of war[29] and may be expected to result in new refinements in technique.

In urging that the slow, weary method of achieving political international legislation by multipartite treaties continue to be followed, the possibilities of assistance in the form of international judicial legislation are not to be ignored in the meantime. Where international judicial or arbitral bodies specially authorized in some manner to do so go beyond existing strict international law to reach decisions on what might be called an equitable basis, the international reign of law is strengthened even though

> . . . this machinery for judicial legislation is, at the most, a temporary device for ensuring that the law will not become entirely stultified, until such time as the international community possesses a legislature in the true sense of the term. . . .[30]

Conclusion

It is submitted that international legislation can best be improved by a two-pronged program:

(a) by continuing to formulate political international legislation in multipartite treaties through improved techniques and with such assistance as may be had from judicial legislation;

(b) by giving powers to the General Assembly of the United Nations to acquire experience in the legislative process in the field of essentially non-political legislation.

27. The trenchant criticism by Professor Lauterpacht of the proposal for an international legislature is particularly applicable to a grant of power to the General Assembly over political legislation. See Lauterpacht, "The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals," 11 *Brit. Y. B. Int'l L.* 134, at 141 (1930).

28. See, for example, Gutteridge, *op. cit, supra* note 9, at 37; Hudson, "The Prospect for International Law in the Twentieth Century" 10 *Corn. L. Q.* 419 at 455 *et seq.* (1925); Heicher and Eagleton, "Problems of International Legislation," 8 *Temp. L. Q.* 218, 376, 505, at 518 (1933-1934).

29. Sohn, "The First Year of United Nations Legislation" 33 *A.B.A.J.* 381 (1947).

30. Jennings, "Judicial Legislation in International Law" 26 *Ky. L. J.* 112, at 127 (1938). See also Lauterpacht, *op. cit. supra* note 27, at 144-154 and Kelsen, *The Legal Process and International Order* (London: Constable & Co. Ltd., 1935).

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doctrine which is the root of the American tradition, which still lives in our Bill of Rights, and which has been for centuries a living force in Anglo-American jurisprudence. This is not to impose an orthodoxy on Mr. Danielson or accuse him of heresy from anything called Americanism. Doctrines are not to be revered because they are traditional or American but because they are true, and he who liberates his country from error is the true patriot. But to argue against American political principles involves a certain burden, and that burden is not met by mere astonishment or by a mere assertion that the principles are unintelligible.

Mr. Danielson's Discussion of the Founding Fathers Is Unsound

Mr. Danielson's methods are further illustrated in his discussion of the Founding Fathers. He says that a phrase used by Jefferson in the Declaration has become patriotic theology for endless politicians and orators, and that what happened was that Jefferson, then a young man and faced with the necessity of justifying treason, formulated a Higher Law and assured his compatriots that they were acting to preserve sacred rights, with God on their side. As a portrait of the part played by natural law and natural rights in the founding of this nation, that is a caricature. The fact was that Jefferson was not the sole author of the Declaration. It was revised by Franklin and Adams, and revision occurred even in the phrase regarding "self-evident" truths. Nor was the higher law "formulated" by them. It had had a history of many centuries and was a commonplace in the thinking of the day. Jefferson himself is authority for this, having said that the Declaration "was intended to be an expression of the American mind", and that all its authority rested "on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c." Therefore Mr. Danielson's attributing the philosophy of the Declaration to Jefferson —and to his youth!—is such a partial statement as to be very bad history and very misleading on the present issue.

The contrast which Mr. Danielson draws between the Declaration and the Constitution is likewise unfounded. He says the writers of the Constitution were more experienced men who indulged in no metaphysics but based the Constitution and the Bill of Rights upon the authority of the People. Obviously, the two tasks were different. The Declaration was a political document, the Constitution a legal one. The Declaration enunciated some political principles. The Constitution set up organic law. And inclusion of a Bill of Rights in the original Constitution was opposed by those who thought it was unnecessary and even misleading to enumerate in that instrument rights which were generally conceded to be natural and not dependent upon legal expression.

That the Individual Must Yield All to "the Public" Is Totalitarianism

Mr. Danielson's second point is that in all rights "the individual is nothing, the public everything." Against the criticism that this is totalitarian, he says that by the public he meant "the People", not the state. But, as above pointed out, this distinction is unreal, because we are talking about "the People", not as a miscellaneous multitude of individuals, but as an organized political society, which is the state. Mr. Danielson himself makes this clear when he says that he believes "that the individual *must* yield to the public and that obedience to the public will is democracy".

I repeat that that is totalitarian philosophy—not *actual totalitarianism*, be it noted, but *totalitarian philosophy;* namely, the political doctrine which is the basis of an actual totalitarian regime. It is not true democratic doctrine, because genuine democracy recognizes the rights of the person, whether he is among the majority or the minority on any issue. In other words, while the will of the majority is to prevail, to be rightful, as Jefferson said, that will must be reasonable and must respect the equal rights of the minority.

This is not individualism. It does not deny that there are purely legal matters in which the state may properly grant, amend and cancel rights —rights which may be called legal rights. Nor does it mean that natural or inalienable rights are absolutes, in the sense of being unaffected by the common good.

The Truth Lies Between Anarchy and Totalitarianism

If I may summarize: There are two common but erroneous theories as to the relation between the common good and the individual good. One is that the common good is in all respects subordinate to the individual good—which is anarchical. The other is that the individual good is in all respects subordinate to the common good—which is totalitarian.

The truth is in the middle. There are some respects in which the individual good is subordinate to the common good, and there are other respects in which the common good is subordinate to the individual good. The criteria are complex and cannot be sketched within the present space, but a point or two might be made.

The Common Good as the Object of Government

It is commonly said that the state exists for the individual, and not the reverse. That is true in one sense, but not in another. The common good is both end and means. It is the end of government, but it is a means of the happiness of the persons in the state. The common good (which in this sense *is* the state) therefore exists for the individual in the sense that it is a means of his happiness; and it must therefore respect those basic rights which are essential to his happiness. On the other hand, the common good is not a mere aggregate of individual goods, which would make it but nominal. There is a real common good, which

is the good of the political community as a whole.

In other words, while the common good must serve the happiness and well-being of the individuals, the individuals in turn must make contributions back to the common good, and individual rights are therefore subject to the latter obligation. For example: Property is essential to human welfare and happiness. Therefore, the right to property is an endowment of nature, not of the state, and must be respected by the state. But that does not mean property without limit of quantity or kind. That is why, when an individual or a class acquire more property than is essential for its welfare and when the common good suffers thereby, the state may by orderly and reasonable means appropriate the excess in the interest of the common good, as it actually does in the case of graduated tax rates.

Natural Rights Have Relative as Well as Absolute Values

To put it another way, there is something absolute about natural rights, and that is their origin. They necessarily arise from the nature of man, because they are necessary for him to work out his human destiny. But there is something relative about them, too, and that is, their exercise. In the concrete circumstances of time and place, they must be *regulated,* in their exercise, by the state, for the common good. The proper regulation of the exercise of man's inalienable rights is not open to criticism, for that is justice. Treating men as if their rights did not exist, a treatment which is properly described as *inhuman,* is the evil thing, which is called totalitarianism.

It is because these principles have been temporarily expunged by the prevailing fashion of thought, with tragic consequences for the greater part of mankind, and because that fashion of thought has invaded our own country, with the foreboding of similar consequences here, that I thought it worthwhile to enter a word of protest and to reaffirm the basis of our blessings.

Totalism Is Not Necessary Answer to False Individualism

Looking at Mr. Danielson's thesis as a whole, it appears to be a reaction against an individualism which violates the common good. The trouble is, that to establish his point he goes to the opposite error of totalism. To nullify false claims of individual right or power against the common good, he maintains that individuals have no rights superior to the state or which the state owes a duty to protect at all hazards.

The truth is that each has rights against the other, and the nation which denies that truth in its philosophy remains just only insofar as it affirms that truth in its practice.

The real ground for concern is that while a nation may survive many errors of practice, it cannot permanently survive false principles, which sooner or later become incarnated in every day life. Up to date, the greater peril has been from individualism. Today, it comes from an exaggeration of state. Because I think that by his writings Mr. Danielson has given impetus to that peril, however unintentionally, I raised the point in the columns of the JOURNAL.

14

Admissions to the Bar

(Continued from page 905)

Residence and Office Requirements After Local Admissions

The Committee's Report further pointed out that the restrictions on local practice of law do not end when an applicant is locally admitted. The Report said:

> The local rules are not clear as to what happens in most of the foregoing counties if the lawyer ceases to reside in the county after his admission. But eight other counties require residence therein *after* admission: Bucks, Chester, Dauphin (or in a part of Cumberland), Erie, Indiana, Juniata, Perry and Susquehanna; of these all but Indiana also require the lawyer's principal office to be maintained within the county.
>
> Five counties (Adams, Allegheny, Clearfield, Northampton, and Westmoreland) require the lawyer to maintain his sole office therein; twelve others (Bedford, Blair, Butler, Cambria, Chester, Columbia, Delaware, Lackawanna, Montgomery, Montour, Philadelphia and Washington) require the lawyer's principal office to be within the county; and two others (Luzerne and Pike) merely require an office within the county.
>
> In a large part of the State, under present rules, a lawyer cannot belong to the bar of more than one county, and this means that he cannot practice, as of right, in more than one of the sixty-seven counties. In twenty-four counties, enumerated above, a lawyer may be unable to be a member of the bar of the county in which he resides and has resided for years because he does not have his "sole" or "principal" office therein. In eight other counties, enumerated above, the lawyer who does have his only office in the county can be disbarred if he moves across the county line to assume a new residence. Cf. *Pike Co. Rules of Court* (1941), 41 D. & C. 223.
>
> There is no such thing as a Statewide bar. In most counties the idea that the mere fact one is a morally perfect member of the Bar of the Supreme Court should make him free to walk into the county court house and present a matter is greeted with hostility and horror.

Shall Admitted Lawyers Be Virtually Barred from Practicing Anywhere?

After discussing Pennsylvania statutes and decisions which are deemed to leave in doubt the validity of at least some of the local restrictions, the comprehensive Report continued:

> From the standpoint of a local Bar Association, the problem of determining who shall practice law in that county involves, or should involve, the desire of the local Bench and Bar to uphold the honor of the profession and to make every effort not to have admitted to the Bar one who will be unworthy of the profession. This is a wholly worthy objective. Those safeguards which are essential to insuring that the practice of law shall be limited to men and women who have the professional training and the character to be competent and honorable lawyers are in keeping with the best traditions of a profession which does hold its standards high despite what is said and thought by misguided and misinformed persons.
>
> From the standpoint of the young man or woman who has spent years of study in college and law school and large sums of money (frequently in-

volving great sacrifices), restrictions on his or her admission to the Bar are a matter of grave import.

It was further stated:

We believe that the unique situation in Pennsylvania which divides a large part of the State into separate county bars and which limits a lawyer to being a member of the bar of only one county, is unsound and wholly contrary to the historical development of the Bench and Bar in England and America. Reference may be made to the former practice of Bench and Bar riding together on circuit and going en masse from place to place. It is indefensible on principle to prohibit a reputable lawyer who lives in a particular county and who, by the payment of taxes, contributes materially to the support of the courts, other governmental functions, and the schools of that county, from practicing law therein. It is indefensible on principle, particularly in this age of a housing shortage, when people must frequently look far afield for a residence, to say that a person cannot practice law in a county unless he has and maintains his residence therein. That is particularly true in the light of modern transportation and the fact that people frequently live in a different county from that in which they work.

The problem *which is serious* today in Pennsylvania is the problem raised by local rules whose practical effect is to prevent qualified persons from practicing anywhere. We strongly condemn all local rules which go beyond requiring the lawyer to maintain his principal office in the county in which he desires to practice. There is no justification for requiring him to reside in the county either before or after his admission to the Bar. In many cases he will reside in that county, but in many other cases a residence requirement imposes an intolerable hardship and restricts the right to live where one chooses or where housing conditions require. In addition, law school deans who are asked to recommend persons for employment in law offices should not be restricted by the facts concerning a student's birthplace or present residence. If the only desire is to have the man reside within the county in order to "size him up," there are other less onerous ways in which that objective can be attained. A rule requiring a continued residence in the county *after* a person has been admitted to its Bar, cannot be related in any way to determining his qualifications (which have already been passed upon), nor has such a rule any relation to familiarity with local practice or availability for service of papers.

It has been part of the tradition of America that a young man should be free to go where he sees fit to build his career. If there are too many lawyers coming to the bar, that may be a reason for devising, in the future, some method of limiting the number of students who will be permitted to study law; but it is contrary to all of the principles which have made this the land of opportunity to stop a man from practicing the profession of the law *after* he has completed his legal education, passed his bar examinations and been admitted to the Bar of the Supreme Court. To stop the young lawyer *at that stage* of the game, upon the sole ground that there are already a sufficient number of lawyers in the community, is a cruel injustice. If that young lawyer turns out to be a man who turned away from school in 1941 to spend five years in uniform, who then came back and finished his legal education and who now stands on the threshold of commencing the career he has dreamed of for years, he will properly feel a resentment against any society so organized as to treat him so outrageously. That man may easily become an antisocial person and an enemy of our form of Government.

Conclusions and Recommendations of the Committee Majority

"We believe it is essential to do something in Pennsylvania *at once* to correct the restrictions on admission of qualified lawyers to practice

law in Pennsylvania," said the Report. "There are several possible methods of accomplishing this. One is by litigation to determine the validity of some of these local restrictions."

A second method of meeting the problem was said to be legislation; a third and preferable method was said to be "voluntary action by the lawyers themselves. The great and honorable Bar of Pennsylvania should not require a mandate from the Supreme Court or from the Legislature to compel it to act with common decency and to refrain from doing a shabby thing."

The Resolutions recommended for adoption were:

WHEREAS, various counties in this Commonwealth now have rules which unfairly restrict the admission to their bars of fully qualified persons who are, or are qualified to become, members of the Bar of the Supreme Court of Pennsylvania, and

WHEREAS such rules are causing the adoption of similar rules in other counties, and

WHEREAS local rules which impose county residential requirements or limitations on the number of candidates to be admitted in a calendar year have no relation to or bearing upon a candidate's educational and moral qualifications for admission to the Bar, and

WHEREAS such rules frequently prevent, and will in the future increasingly prevent, worthy young men and women who have completed their law school courses from practicing law in Pennsylvania.

Now Therefore Be It Resolved by the Pennsylvania Bar Association, That

1. This Association disapproves all local rules of Court which make prior residence within the county a pre-requisite to admission to the County Bar.

2. This Association disapproves all local rules which make residence within the county a requirement of continued membership in the County Bar to which a lawyer has been admitted.

3. This Association disapproves all local rules which limit the number of candidates who may be admitted to a County Bar within a prescribed period of time.

4. This Association urges the repeal of all such rules in the counties in which they now exist because (1) they are unfair and unreasonable and (2) they will compel other counties to adopt similar rules by way of self-protection and thereby create an intolerable situation in Pennsylvania.

5. This Association urges the County Bar Associations in counties which do not presently have such restrictive rules to refrain from recommending their adoption.

Committee's Resolutions Are Not Adopted

The Report and Resolutions were debated and voted on in one of the Association's most crowded meetings. The vote first taken resulted in the defeat of the recommendations by 174 for and 177 against. A secret ballot taken about an hour later resulted in 152 votes for and 181 against the recommendations.

The advocates of remedial action in the interests of the younger lawyers admitted to the Bar of the Supreme Court of Pennsylvania do not accept the vote as ending the issue.

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Coordination of Taxes

(Continued from page 908)

delegate the duty to cooperate to well-qualified personnel. Three Committee members urge the creation of a Federal-State Committee for continuous study of tax coordination.

The report closes with the note which runs through the entire 161-page document. Most students of the problems will be in agreement.

The sentence reads: "So long as we enjoy the benefits of a federal form of government, with its constituent central and State units, a certain amount of tax overlapping and duplication is inevitable. The burden of this price of democratic government can be greatly lightened, however, if those charged with tax policies and tax administration of the various governments will remain constantly on the alert to mesh the gears of their tax machinery as smoothly as farsighted statesmanship and skillful administration can make possible."

This extensive report is that of a voluntary group of citizens; it has been subsidized by no government and by no foundation. The time and thought that have gone into this work are the contribution, without compensation, of people whose concern with existing conditions has lead them to speak out.

Letters to the Editor

(Continued from page 927)

ment appearing in your June issue. Undoubtedly this is the greatest issue before the American people and the American Bar today. It should be discussed and debated without stint, for only by a fearless consideration of the issues, can we hope to win the peace for which our soldiers and sailors have perished.

Let us have more on this burning issue.

LAWRENCE S. APSEY

Concord, Massachusetts

Anecdotes Inspired by Ben W. Palmer's "What Lawyers Wear"

To the Editors:

The very interesting and instructive article by Mr. Palmer, "What Lawyers Wear", in your June issue, brings forward two anecdotes:

Newton D. Baker had a story about Chief Justice Taft and the Supreme Court. A lawyer from the "back woods" or the "sticks" came, by some extraordinary or untoward happening, to have a cause to argue in the Supreme Court. He had never worn a collar in his life, and he did not want to wear a collar when he made his argument in the Supreme Court. Therefore, before the argument he sent word in to the Chief Justice asking the privilege of arguing his cause in the Supreme Court without wearing a collar. The reply of the Chief Justice was: "No collar, no argument."

The presiding judge of one of the Circuit Courts of Appeals of the United States related the second anecdote to me:

There was a mountain lawyer who wore his pants tucked in the tops of his boots, the same as all our grandfathers did, all during the boot era. This lawyer argued a cause in a lowland Court of Appeals with his associate from the lowlands. He lost his appeal. The mountain lawyer asked his lowland associate "how come" he lost the appeal. The lowland associate wrote back, saying: "How could you expect to win going into Court with your pants rammed down in your boots?" The mountain lawyer went to the presiding judge of the Court of Appeals and said to him that he understood that he had lost the case because he had his pants in his boots. The presiding judge said: "Oh, no, that is incorrect. In our opinion we gave our reason for deciding against you." "That's just it," said the mountain lawyer, "the boot reason was so much better than the opinion reason that I thought my associate was right."

F. O. RICHEY

Cleveland, Ohio

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